ORIGINAL

21-CV-703

DONNELLY, J.

UNITED STATES DISTRICT COURT

FOR THE
EASTERN DISTRICT OF NEW YORK

LORENZO McGriff,
Petitioner,

-Against-

Readon, SUPERINTENDENT
Marcy Correctional Facility,
Respondent.

BRIEF FOR PETITIONER TO BE SUBMITTED IN SUPPORT OF WRIT OF HABEAS CORPUS ON BEHALF OF Lorenzo McGriff, Petitioner - Pro-Se

The Pro-Se Office
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
225 CADMAN PLAZA EAST
BROOKLYN , NEW YORK 11201

TABLE OF CONTENT

Title	Page(s)
Brief Cover	i
Affidavit of Service By Mail	ii
Rule 30, 28 U.S.C.A. Statement	1
Preliminary Statement	2
Question Presented	3
Statement of Facts	4
The Trial- Jury Selection and Batson Challenge	5-7
The People's Case	8
The Defense Case- Petitioner's Testimony	13
Cross- Examination	15
EMT Testimony/ Defense Attempt To call Nicole McGriff	17
Summations	18
Jury Instructions, Deliberation and Verdict	21
Defense Motion to Set Aside Verdict- Petitioner's back-round and Sentencing	23
GOUND: 1 / Standard of Review: Trial Court's Improper Jury Instruction and Trial Counsel's Ineffective Assistance During Critical stage of Proceeding	27
Meeting Standard of Review	31
Standard of Review- New York's Contemporaneous Objection Rule, CPL § 470.05	38
Issue/ The State Court Ruling	39
Standard for Determining the Adequace of Stae Ground of Decision	42
GROUND: 2 / Standard of Review: Weight of Evidence Element-Based Review Legal Sufficiency Challenge	48
Meeting Standard of Review	50

Title Page(s)

GROUND: 3 / Standard of Review: Prosecutorial Misconduct/Meeting Standard of Review 59
GROUND: 4 / Standard of Review: Prosecutor's Misconduct Enterjecting Umsupported, uncharged Theory of Crime, Creating Impermissible Duplicity 68
Evidentiary Claim: 71
GROUND: 5 / Standard of Review: The Court Erred when it Excluded as "Collateral" Petitioner's Wife's Testimony/ Meeting Standard of Review 73
Legal Standard 78
GROUND: 6 / Standard of Review: Court's Error Denying Counsel's Batson Application/ Meeting Standard of Review . 80

Lorenzo McGriff,
Petitoner,

AFFIDAVIT OF SERVICE BY MAIL

-Against-

Readon, SUPERINTENDENT
Marcy Correctional Facility
Responent.

STATE OF NEW YORK)
COUNTY OF ONIDA)SS.:

I Lorenzo NcGriff, being duly sworn depose and says: I am the Petitioner, Pro-Se, in the above-captioned action. Following the below indicated date of notarization, I served by mail, 1 original and 2 copies of the annexed Habeas Corpus Petition Upon:

The Pro-Se Office
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
225 Cadman Plaza East
Brooklyn, New York, 11201

At the Above Noted Address.

DAVID E. JOHNSON
Notary Public in the State of New York
Qualified in Oneida County 01JO6295737
My Commission Expires Jan. 6, 2022

sworn To Before Me on This

Respectfully, ect.,

2 day of May, 2020

David E. Johnson
Notary Public

Lorenzo McGriff
marcy Correctional
Facility Box 3600
Marcy, NY 13403

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF NEW YORK

Lorenzo McGriff.

Petitioner,

-Against-

Readon, SUPERINTENDENT
Marcy Correctional Facility
respondent.

RULE 30, 28 USCA STATEMENT

1. The indictment number in the state court was 6248/2015.

2. the full names of the original parties were People of the state of New York Against Lorenzo McGriff. The parties are now Lorenzo McGriff against Readon, Superintendent Marcy Correctional facility.

3. This action was commenced in Supreme Court, Kings County.

4. It was commenced by the filing of an indicment on August 19, 2015.

5. This petition seeking habeas corpus relief is from a judgment convicting petitioner, after a jury trial, of second-degree assault.

6. This petition seeking relief is from a judgment of conviction rendered January 20, 2017.

7. Petitioner is requesting to proceed as a Poor-Person and for assignment of counsel, to assist with the perfection of the issues at bar present upon this petition. The appendix method is not being used.

PRELIMINARY STATEMENT

Petitioner Lorenzo McGriff seeks habeas Corpus relief from a January 20, 2017 judgment of the Supreme court, kings county, convicting him, after a jury trial, of second-degree assault **(P.L. 120.05[2])**, an sentencing him to 7 years in prison to be followed by 5 years of post-release supervision **(Cyrulink, J., at trial and sentence).**

The Appellate Division Second Department affirm his conviction by Decision & Oreder, dated September 18, 2019 and the New York Court of Appeal, Second-Department denied Leave on 11/27/2019 (DiFiore, Ch. J.)

Petitioner, declair that his custody is in violation of the Constitution, Laws and treayies of the United States, as the result of this conviction. 28 U.S.C. § 2254(a).

Petitioner had no co-defendants at trial. He is currently incarcerated pursuant to the judgement.

QUESTION PRESENTED

Whether the state court's invoking procedural rules in deny ing Petitioner's appeal, " contrary to, or involved an unreasonable application of clearly established federal law " or base on an unreasonable determination of facts in light of the evidence presented in the state court proceedings ?" 28 U.S.C. §§ 2254(d)-(2006).

STATEMENT OF FACTS

Introduction

Petitioner Lorenzo McGriff, a married, middle-aged man on his lunchtime break from his job as a peer specialist working with the mentally ill, was walking around the block in downtown Brooklyn when Mohammed Khalifa a stranger, elbowed him in the collarbone. When petitioner pushed him away, Khalifa called petitioner, an African American a " fucking nigger " and a " slave ", and threatened to " kick [his] ass ". Petitioner, retreated, but Khalifa followed him across the street and down the block. And when petitioner, winded from trying to get away, perceived that Khalifa had picked up a brick from a contruction site and was swinging it at him, petitioner jabbed Khalifa five times with a sharp instrument in an effort to make him drop his weapon. Petitioner then fled the scene, with Khalifa still in pursuit. Khalifa was then picked up by **EMTs**, and proceeded to call them " niggers " and " bitches ". khalifa eventually required sedation to be treated. Hospital records revealed that Khalifa tested positive for cocaine. Khalifa did not testify at trial; Petitioner , who did testify, raised a justification defense premised on Khalifa's aggressive, abusive, and apparently drug-fueled behav - ior.

During jury selection, the people exercised 9 out of 11 peremptory challenges against black members of the panel. The court denied petitioner's objection to these strikes, ruling that he had not made a prima facie case of racial motivation.

Both at trial and during summation, the prosecutor called petitioner a liar and embellisher, and asked, among other things, why he failed to preserve the weapon Khalifa had menaced him with The prosecutor also argued at summation that even if petitioner was initially justified in using force, he may have " chased " Khalifa, negating his justification defense.

the jury ultimately acquitted prtitioner of attempted first-degree assault but convicted him of second degree assault . Although the court was presented evidence that petitioner, a family man with a full-time job, suffered from bipolar disorder and previously undiagnosed post-traumatic stress disorder, connected to a debilitating injury he suffered as a child, the court imposed the maximum 7-year sentence.

The Trial

Jury Selection and Batson Challenge

Round 1

At the end of the first round of jury selection, the prosecutor exercised peremptory challenges against panelists Ashley Dun and Khandija Barrow, both of whom were black (J. 121, 283).[1] During defense counsel's questioning, Dunn had indicated that she looked for consistency in witnesses and, along with Barrow, answered affirmatively when asked "would you stick by what you believe in?" (J. 108, 112). Both Dunn and Barrow provided biographical information, such as neighborhood and job, during the court's

initial voir dire; neither was questioned by the prosecution (J. 72-73, 88- 99).

Eight jurors were seated from the first roun, three of whom were identified as black by the prosecutor. Among the non-black jurors seated were Sean McGuinness, who had prior theft conviction; and Morley Bland, who was a crime victim, had served on both a criminal and civil jur had volunteered previously for a public defender, and revealed that she experienced unpleasent interaction with people on the street "[a]ll the time" (J.79, 85 - 86, 94-95, 106, 121-22, 285).

Round 2

At the end of the second round, the prosecution struck panlists Gerard Philip, Andrea Solstad, and Puline Stewart, who were black and Tara cascone, who was white (J. 196-98, 200, 283). Slstad, who related a story about subway harassment, earlier had been challenged unsuccessfully by the prosecution for cause (J. 152-53, 167, 181-84, 189-90, 198-99). Outside of providing neighborhood, family, and work biographical details, neither Stewart nor Philip spoke during questioning, except for when Philip answered defense counsel's question about the meaning of the presumption of innocence(J. 135, 144-45, 158-59, 186). Cascone had

1 Citations prefixed by "J" refer to jury-selection minutes; "H" to minutes of the post-trial hearing held on January 17, 2017, an "S" to sentencing minutes. Unprefixed citation refer to Volume II of the trial minutes. All cited documents are contained in the Supreme Court file, except for the pre-sentence report ("PSR") which is submitted her under separate cover.

reported being a recent victim of theft (J. 151).

Two jurors were ultimately seated from this second round. One was black, and both had been engaged by the prosecutor during questioning (J. 169-72, 202, 285-86).

Round 3

At the end of the third and final round of jury selection, the prosecution struck panelists Yvonne Best, Melina Grant, and Marlene Laplante- all black- and panelisit Glen Mendez, who was identified by the defense as black (J. 275-77, 280. 284-85). A single white panelist, Elyse Barton, was also struck (J. 281,285)

Of the struck black panelists, Grant had been asked only ppeliminary biographical questions by the court, while Best had told the prosecutor that she would have "[n]o problem" evaluating the case even if the complainant did not testify, and Laplante described herself as "very emotiomal" (J. 213-15, 255, 259-60). Panelist Mendez asked the prosecutor why the compainant would not be present, but also agreed to follow the court's instructions about the complainant's absence (J. 258-60).

Batyson Challenge

After the selection of the final alternate, defense counsel made a batson challenge, contending that out of 11 total peremptory challenges, the prosecution had used 9 to strike black panelists and only 2 to strike white panelists (J. 282-85).[2] Defense counsel observed that neither Barrow nor Dunn, the first-round panelists, had made "any statements during voir dire ... one way or the other"(J. 283). Of the second-round panelists, panelists Philip and Stewart "said virually nothing during voir dire"

although counsel acknowleged Solstad's discussion about being a crime victim (J. 283). With regard to the third round, defense counsel noted that 4 of the prosecution's 5 strikes had been against black panelists (J. 284-85). When the court observed that panelist Mendez might be Hispanic rather than black, defense counsel disagreed, and the court did not comment further (J. 284). In closing, defense counsel observed no apparent race-neutralreasons for the "pattern" of strikes against black panelists other than Solstad, which led ultimately to a majority-Caucasian jury (J.285

In a short response, the prosecutor labeled "presumptive" and "unfair" the allegation of a majority-Caucasian, saying that "we don't probably know half the race of people seated" (J. 285 - 86). He pointed to 5 seated jurors that either were black or that he "believe[d]" were black, as well as at least one of the alternates, and commented that he had "no idea" of panelist Solstad's ethnicity (J. 285-86). the prosecutor nevertheless represented that he would "meet [his] burden" if the court found a pattern (J.286).

The court summarily denied the Batson application, ruling that "across the board I do not find a pattern" (J.286).

The People's case[2]

Shortly after 1:oo P.M. on August 11, 2015, security camera footage showed petitioner, an AfricanAmerican man, walking along a street in downtown Brooklyn, followed by Mohammed Khalifa (Peo-

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2 Dfense counsel referred to 10 peremptory callenges, contending that panelist Nelson was deprived of a seat on the main jury, but Nelson was not challenged until the main jury had already been cjosen (J. 207, 278, 280, 284).

ple's EX. 2 [security footage]). When petitioner crossed the street into busy traffic, Khalifa continued to follow him (Id, at 1:07:23). Blocked by a construction site from reaching the sidewalk, petitioner resumed walking on the street itself (Id. at 1:07:30). Upon reaching the same construction site a few moments behind petitioner, Khalifa bent over and appeared to pick something up from the ground and wrap it in some clothing, which swung back and forth in his hand as he continued to follow petitioner (Id. at 1:07:33-40).

A few moments later, petitioner turned around and charged forward, causing Khalifa to back up (Id. at 1:07:37-46). The men began to scuffle and argue. As Khalifa repeatedly approached petitioner, Petitioner both told and gesturted at khalifa to "get away" from him, and asked if Khalifa was going to "keep on saying what [Khalifa] was saying" (Janelle Toribio [eyewitness]: 4-6, 23-24; kadesha Guy[eyewitness]: 33-34; Ashley Reyes [eyewitness] : 112-13).

Although petitioner and Khalifa eventually moved out the frame of the security footage, a cell-phone video taken by kadesha Guy, a passenger in a nearby car, captured petitioner and Khalifa arguing in the street, with Khalifa holding somethingthat was swining back and forth and petitioner alternately reteating and moving forward (People's Ex. 7 [cellphone footage] at.00-10). Khalifa continued to advance on petitioner (Toribio: 6-7). Petitioner then thrusted at Khalifa three times with a sharp instrument, and someone in the car yelled "he's stabbin'him" (Guy: 35, 39-40, 60; Peoples's Ex. 7 at 12-25). A photograph extracted from the cell-phone video showed petitioner holding Khalifa's arm in

his left hand and a short, sharp instrument in his right, while Khalifa held what appeared to be an article of clothing (People's Ex. 8 [cell-phone still]).

The two men were not in the frame of either video for about 20 seconds, at which point petitioner reappeared on both recordings, running down the street (People's ex. 2 at 1:08:31-38; people's Ex. 7 at .38-42).

two witnesses and a recording of a 911 call were presented at trial tp fill that 20-second time gap. According to Janelle Toribio, who was standing about 7 feet away, Khalifa clung to petitioner and, after an additional struggle in which the careened into a car, both men entered an empty, under-construction storefront, where they remained for "[m]aybe a minute, not very long" (8-9, 12-14, 24; People's EX. 4 [street photograph]). When petitioner emerged, he pocketed a knife (which Toribio had not previously seen) before running down the street(14-17, 27). Bleeding from the head, Khalifa exited the storefront, screamed "I am still alive", and ran after petitioner (14-15, 17, 28).

Ashley Reyes was focusing her attention on a potential client when she became aware of petitioner and Khalifa arguing about 8 to 15 feet away from her (109-10, 112-13, 120; Poeple's Ex. 5)[3]. They ran towards her and she moved out of the way (112,114,116). She testified that petitioner, whom she described as "professionally dressed" with a "vest and button up outfit" or a "suit" although petitioner was actually wearing jeans and a beige shirt - was holding a knife and "chasing after" the "yelling" Khalifa,whose head and chest were already injured (112-17, 119-20; People's

Ex. 10 [post-arrest photograph]). Unlike Toribio, Reyes testified that petitioner attacked Khalifa as khalifa "fell into" the store front, which was behind her and occupied, not empty (114, 116 -17 120). Petitioner, "in the suit", then "came out and ran away",and Khalifa emmerged shortly afterwards; Khalifa, yelling, tried to run in the same direction (117-22).

neither Reyes nor Toribio saw anything in Khalifa's hands during the encounter, although Toribio was initally uncertain (Toribio: 8, 16, 25, 30; Reyes: 117-18, 120-21). Guy who was nearer, did not recall seeing Khalifa holding any "object" or "kinds of weapon", but thought that Khalifa was holding something- however, she was "not sure what it was" (49). Guy also recalled that as petitioner ran away, Khalifa followed him, running in the same direction a few mintues later (41, 44-45, 51).

The people also played a 911 recording for the jury. The caller said a man "chased another guy who stabbed him"' and that both men had "just ran down Schermerhorn" Kevin Hayes [NYPD technician]: 125-29; People's Ex. 11]911 call]).

Officer Caleb Louard arrived at the scene and was directed by a series of pointing passersby to an intersection about 6 city blocks away. There, he discovered Khalifa, who was walking but laboring and bleeding from "what appeared to be ... stab wounds" to his head, torso, and arm (Louard: 61-67, 101-06). khalifa "seemed determined to continue walking" and did not "immediately" heed Louard's direction to stop and get down, but he even-

3During Reyes's testimony, the court sustained four objection to editorializing comments in her answers (115-16, 118-19, 122).

tually complied and pointed south (Louard: 67-69).

Louard and another officer discovered petitioner one block away, down on the ground behind a parked minivan. Louard testified that he had not ordered petitioner to the ground and did not recall hearing another officer do so (Louard: 69-72, 76, 89-90 ; People's EX. 9 [arrest footage]). According to Louard, petitioner tried to stand and did not "immediately give both of his armsupon request" to be handcuffed, but Louard was unsure about whether he had asked petitioner to show his hands (72-73, 91, 95).

Louard searched petitioner and did not find a weapon. Pettioner, who was 6'1" and about 300 pounds, was uninjured (Louard: 73, 77-78).

Khalifa was taken to the hospital (Louard: 80). Medical records described Khalifa as "combative", "highly uncooperative", "extremely verbally belligerent and threatening", and "severely agitated" (People's EX. 1 at 3-4, 7 [Medical Records]). They recounted Khalifa standing up on the stretcher and "scream[ing] out religious statements" even as he was bleeding, to the point that he required "sedat[ion]" in order to be treated for his wounda, and was intubated to "protect staff and patient" (Id. at 3-8. 10-11). After testing positive for cocaine, Khalifa signed himself out against medical advice while "threaten[ing] bodily harm" to the staff, and had to be ecorted out of the hospital by security (Id. at 2, 25, 53) never to be seen again.

The Defense Case

Petetioner's Testimony

Petitioner was a Brooklyn-born man in his mid-40s, married with two adult sons, who sufffered from diabetes and was a heavy smoker (159, 164, 174, 198). Petitioner, who agreed he had one prior felony conviction, testified that at the time of the incident, he worked as a forensic peer specialist at an office on Baltic Street in Brooklyn, assisting persons diagnosed with Axis 1 psychiatric disorders (159-61, 164, 167, 174, 199, 262).

Petitioner was in the midst of his daily lunchtime walk around the block when, on busy Joraelmon Street near Brooklyn Law School, he encountered Khalifa (161-63, 201). As the two men pass ed each other, Khalifa suddenly "lift[ed] his elbow up" and "jammed it ... in[to] [petitioner's] collarbone" (162). "[S]tartled," petitioner shoved Khalifa away from him(162, 172, 202).

Khalifa "growl[ed] ... you fucking nigger" and started to "rant and rave", calling petitioner a "slave and threatening to "kick [his] ass" (162-63). When petitioner walked away, Khalifa ran up behind him and shouted, "Motherfucker. Where the fuck you going?" (163).

Accustomed to working with people suffering from mental ill ness, petitioner "notice something was off" about the"drool[ing]" Khalifa and his "erratic" body language (163, 172). Petitioner reasoned that "you encountered all kinds of things" on the street

including "sick people", so he resolved to "walk away" from what appeared to be "more than a rational situation", hoping Khalifa would lose interest once petitioner created distance (173-74). Petitioner crossed the street, at one point running at "top speed" into heavy traffic, in an attempt to lose Khalifa, to attract police attention if necessary, and eventually to return to his office (163-64, 172-75).

But Khalifa continued to follow, "yelling" and "ranting" slure like "[y]ou nigger" and "[t]ake your ass back to Africa" (163-64, 172,75, 204). Petitioner saw no police he could flag down(188). After turning the corner onto the street captured by surveillance footage, petitioner slowed because, as an overweight smoker, he had to "catch [his] wind"(164, 229).

Turning around, petitioner saw that Khalifa had wrapped a brick or rock in a shirt he was carrying, and was leveraging it to swing at petitioner (164-65, 182). believing he was in danger of imminent attack, petitioner tried to grab Khalifa's arm, and then jabbed Khalifa with a wire stripper tool, not a knife (165-67, 182-84, 195-96, 219). petitioner tried to aim low, in an attempt to get Khalifa to stop, but Khalifa did not retreat or initially drop the brick (166-67).

The two men "tussle[d]", causing Khalifa to drop the brick and stummble into a nearby construction site, which petitionerdid not recall entering himself; believing Khalifa was no longer a threat, petitioner then dropped the wire stripper and ran away,

"adrenaline ... high," before eventually slowing to a walk (167-68, 184-85, 190). petitioner denied chasing Khalifa during the encounter(232-33).

Petitioner identified on surveillance video where Khalifa picked up the brick and whirled it at him (182-83, 270-71). In the cell phone video, petitioner also identified a "rock in the sweater" dangling from Khalifa's hands, and said that petitioner grabbed khalifa's hands "because [Khalifa] is trying ... to swing it" (187). Petitioner pointed out moments on the cell-phone video where he tried to turn around and walk away (188).

Once away from the scene, petitioner intended to take a back route to his office, but realized Khalifa was still yelling and in pursuit, although at enough of a distance that petitioner could not hear the words (167-68, 180, 189-()). Petitioner didnot want to "bring this to [his] job", so he "zigzag[ged]" in an attempt to lose Khalifa and find authorities who could help him (168, 175, 207, 253). Petitioner then heard the police behind him and testified that officer Louard ordered him to get on the ground, denying that he resisted arrest (168-69, 190-94).

Cross-Examination

during cross-examination, the prosecutor questioned petitioner's story about Khalifa's wielding a brick or rock. Petitioner was "the only person that has come in court [and] said [Khalifa] picked up a rock, right?" and the jury would have to "rely on" petitioner's testimony and "take [his] word for that" point (226, 238). The prosecutor also asked petitioner why he "didn't stay on scene" so that he could have the police "secure the boulder so we have it at trial" (252).

The prosecutor also repeatedly questioned petitioner's test imony that the tool was a wire stripper and not a knife (216, 223 and attepmted to get petitioner to admit it was a knife(255). Petitioner sometimes corrected the prosecutor's inquies about the "knife" (216, 223), but other times repeated "knife" in his answers (218-19, 262). The prosecutor asked petitioner why he had not "Kept" it so he "could have show[n] it to the police", and theorized that petitioner had disposed of the instrument "[b]ecause it ha[d] the[complainant's] blood on it" (255). Defense counsel's objection to this last comment was overruled (255-56).

The prosecutor pressed petitioner about why he did not take advantage of other purported "options" in the encounter, for instance, the prosecutor asked if "[t]he only option you are telling everyone is to pull out the knife and stab him" (222-23, 248) and inquired about whether petitioner had warned Khalifa that petitioner "had a knife" (216). The prosecuotr also asked petitioner on five separate occasions why he did not call 911 (226, 251, 264), or otherwise "wait on the scene" for police to arrive and " have this man arrested" (248).

With regard to petitioner's conduct after the encounter,the prosecutor asked why he did not immediately return to his office, suggesting that rather than trying to escape Khalifa, petitioner was trying to lose "the police"; petitioner answered that there were "no police to dodge" (207). the prosecutor attacked petitioner claim that Khalifa continued to pursue him (207, 230, 257).

Finally, the prosecutor extensively questioned petitioner regarding his arrest, in part by asking him to comment on the vedio recording(257-61). Nothing the inconsistencies between petitioner's testimony about being ordered to get on the ground and Officer Louard's denial of that, the prosecoutor pressed petitioner on whether Louard had "lied" in court (257-58).

Only once did the prosecutor impeach petitioner over inconsistenties with his grand jury testimony: Petitioner had told the grand jury he dropped the wire stripper on Boerum Street, but now testified he dropped it one block away on Court Street, at the scene (249-50); People's EX. 12 [map]).

EMT Testimony

Dominique Boyd, an EMT who treated Khalifa, testified that Khalifa, was "verbally abusive and really aggressive", calling her and her black female partner "niggers and bitches", refusing to let the medical team touch him, "yelling and screaming," fighting and "assault[ing]" the team, and refusing to allow his wounds to be dressed (281-87; Defense Ex. A [EMT report]). Khalifa was "swinging his arms around, trying to get us off of him" (288). Another crew was called in order to sedate him so that he could be treated and transported (284, 287; Defense Ex. A).

Dfense Attempts to Call Nicole McGriff

When the defense attempted to call petitioner's wife,Nicole McGriff, as a witness, the prosecutor challenged the relevance of her testimony and asked for an offer of proof (276-77). Defense counsel explained that Nicole, petitioner's wife of 25 years, would testify that petitioner carried around a wire stripper be-

cause one of his hobbies was repairing speakers and other equipment, and argued that her testimony was necessary because the prosecutor "has been repeatedly calling [the tool] a knife" (277) the prosecutor responded that this proposed testimony was "collateral", bcause either a wire stripper or knife could be a "dangerous instrument", and alleged that "several times throughout [petitioner] own testimony he refered to it as a knife" - although the prosecutor also conceded petitioner "mostly" said"wire stripper" on direct (278). the court excluded the testimony as collateral and noted an exception at defense counsel's request (278).

Summations

In its summation, the defense called justification the "main issue" in the case, emphasizing that Khalifa elbowed petitioner purposefully, pursued petitioner for several blocks, and continued to behave aggressively and erratically even at the hospital (313).

The people's summation repeated many of the themes from cross-examination. The prosecutor argued that despite petitioner's options of "feeling the situation" and resolving the despute in another way," petitioner "chose violence" (334). According to the prosecutor, petitioner also ignored the "choice of calling 911"or of "securing this boulder or brick" for trial (334); while later conceding petitioner "doesn't have to call 911," the prosecutor suggested that it showed that his story was false and that he was not really afraid of Khalifa, who was "fleeing" from petitioner, "[m]ake no mistake about it" (339).

The prosecutor encouraged the jury to find that thepeople's witnesses had testified truthfully, while petitioner had lied to them on the stand. The people's witnesses had "no bias" and "no motive to lie for either party" (338). By contrast,"eveything[petitioner] told you ... was an embellishment in some way" or " a straight up lie" (341), such as petitioner's testimony that Khalifa was "going to keep attacking me even though I stabbed him" (349). Petitioner's story about Khalifa whirling a brick was "embellished," and petitioner was lying about his fear because he "needs [the jury] to believe ... he had this fear from this tiny man [who] has no weapon," as "[u]nder no view of the evidence was [Khalifa] armed" (338, 342, 360). The inconsistency between petitioner's grand jury and trial testimony aboutwhere he dropped the weapon was "nonsense" because petitioner "knows what he said in the grand jury" and"will say anything to you" (356).

With regard to the missing tool, the prosecutor argued that petitioner "didn't have an excuse" for it, asking "where's the knife? where's the knife? and telling the jury that petitioner "eventually... started calling it a knife on the witness stand" (355). Pointing to the screenshot of the cell-phone video, the prosecutor asked the jury to "[u]se your own eyes... [t]hat's not a wire stripper ... [c]lear as day that's a knife" (355). Defense counsel's objection to this last comment was sustained (355). The prosecutor suggested that petitioner was motivated by a pattern of anger and vengence. Five minutes into cross-examination petitioner was already "extremely angry" and thus was likly "ten-times angrier" when encountering Khalifa(345).

"No one talks to [petitioner] like that. Right? All six foot one, 300 pounds of him. He is not used to this" (338). According to the prosecutor, petitioner wanted to "teach [Khalifa] a lesson" for " walk[ing] around Brooklyn and call[ing him] those word's (343). "Here is how I solve my problems. It's with my knife" (346 "Why", the prosecutor asked, "couldn't he punch him in the face again and agin ... instead of pulling out the knife?" because"[i] f that [had] happened we wouldn't be here" (346).

The prosecutor told the jury that they should view petition er's conduct after the encounter with skepticism. Petitioner's decision to leave the scene was "even more damning behavior", because Khalifa was "down, prone" and petitioner was "twice hissize "(348-49). That petitioner walked "against the vehicular traffic" was "extremely suspicious" because "[h]e is going against the traffic to dodge the police" (352). Similarly, his path to where he was apprehended showed petitioner "trying to stay off the main road" (352). As he had during cross-examination, the prosecutor challenged at length petitioner's version of the events surrounding his arrest, asking the jury, "what's Officer Louard's motive to lie ...?" (353).

The prosecutor concluded by exhorting the jury to convict:

> [E]even if you believ that Mr. Khalifa had any kind of object or the defendant thought he had this object, once he ... breaks away and is running and fleeing towards that construction site, okay, the fight is over ... he now can no longer use that knife. The man is done. He is stabbed and fleeing. He didn't do that. Because that's not what the defendant does. He was going to

> teach Mr. Khalifa a lesson for those nasty things he said to him. ... He is on trial because of the choices he made that day. The choices of escalating a situation where he could have punched a man, to the situation where he pulled out a knife. He stabbed him again and again and again. It was not self-defense. It was assault (358-60).

Jury Instructions, Deliberations, and Verdict

Two counts were submitted to the jury: attempted first-degree assault and subsatantive second-degree assault, both premised on the use of a "dangerous instrument" (Indictment at 2). The people had earlier dismissed a substantive first-degree assault count, conceding that they could not make out a case for the infliction of serious physical injury(J.21).

The court gave a missing-witness instruction regarding Khalifa's absence from the trial (378). the court further instructed that the jury "must accept the principles of law as I define them," and that they were not "required to accept the arguments ... made during summations", but did not tell the jury to disregard statements of the law made by the parties (366, 368).

The court charged the jury on the defense of "physicalforce " justification, explaining, in pertinent part, that petitioner's use of force would be justified "when and to the extent that he reasonably believe[d] to be necessary to defend himself from what he reasonably believe[d] to be the use or imminent use ofphysical force" by khalifa, and did not require petitioner to wait untilhe [wa]s struck and wounded" (384, 386- 87). The people did not ask

for, and the court did not give, any instruction on the use of deadly force.

In explaining how justification applied across the counts, the court instructed that it was "an element of each" and then stated:

> [I]f you find that the people have failed to prove beyond a reasonable doubt the [petitioner] was not justified, the you must find him not guilty under counts one and two (387, 431 [recharge]).

The court omitted C.J.I. language direction the jury to acquit a defendant of "that count and of the remaining count(s) to which that same definition of justification applies". In charging each count, the court included justification as an additional element, but after articulating the elements of the attempted first-degree assualt count, the court segued by stating: "The second count you will consider is assault in the second degree" (389-90)(emphasis added). The verdict sheet did not mention justification, containing only a listing of both counts with boxes to check for "guilty or not guilty".

Over the course of its deliberation, which extended intothe afternoon of the next day, the jury asked to be reinstructed on the charge , including "justification as it applies to both charges" (402-38; court exs. 1-6). the jury then acquitted petitioner of attempted first-degree assault but convicted him of second-degree assault (438-39).

Defense Motion to Set Aside Verdict

Defense counsel moved to set aside the jury's verdict, argu ing that petitioner should have prevailed on his justification de fense (H. 4-5). Responding, the prosecutor said that "[a] large part" of the people's summation was that "this incident was real- ly two separate incidents and after the initial blows were struck and [Khalifa] fled from [petitioner], [petitioner] pursued him" (H. 36). The court decliend to set aside the verdict(H. 6).

Petitioner's backround and Sentening

In addition to the Probation pre-sentencing report and a short memorandum by the people, the count considered a pre-senten cing memorandum ("PSM") prepared by a Harvard-educated trauma specialist on behalf of petitioner. Based on interviews with petitioner, petitioner's family, prior case workers/mangagers,and defense counsel, it set forth petitioner's family backround, ment tal-heath struggles, and history of trauma, urging a lenient ap- proach to sentencing.

Bron in Brooklyn in 1996, petitioner was raised in aturbul- ent household marked by his parents' unstable relationship (PSM2) At age 15, petitioner was hit in the head with a baseball bat, and fell into a four=month coma; his injuries were severe enough and prospects for recovery so dim that he was nearly taken off life support (Id). While he nevertheless recovered, he was temp- orarily paralyzed, and his injury caused him to drop out of school in the tenth grade (Id.)

Although petitioner supported himself with messenger jobs and similar work, the injury, coma, and resultant trauma "canged" him, leading to complex trauma symptoms such as "sudden emotional or physical reactions", "feeling on guard", flashbacks, and "feeling powerless" (Id. at 2-4). These trauma symptoms were suggestive of PTSD, with which he had never been previously diagnosed - and which, if left untreated (as here), often leads to increased likelihood of evcounters with the criminal justice system(Id. at 2). Petitioner also suffered from symptoms of depression(Id. 4).

In 1989, petitioner was convicted of misdemeanor assault, and in 1992, petitioner was convicted of felony manslaughter (Id. at 3 PSR 3). He spent 17 years in prison for the felony offense, during which he remained married to his wife, whichwhom he has a son; petitioner has another son from a previous relationship (Defense Memo. at 3). While in prison, petitioner was formally diagnosed with Bipolar Disorder, for which he was medicated (Id.). Petitioner obtained his GED while in prison (PSR 4).

In 2009, petitioner was released on parole, during which he presented no problems and obtained an early release (PSM at 4). He received extensive counseling and therapy, and completed the one-year "Howie The Harp" peer-training program,[4] whit his social worker calling petitioner "one of [her] best clients" and a very-good peer counselor" who "is the type that always tries to stay away from trouble" (Id.).

In 2012, petitioner became a peer counselor of the Mental Health Association of New York, managing daily operations, co-leading groups, and working with 23 clients (Id. at 4-5). He was

promoted in 2014, and eventually moved to a new position as a Peer Advocate at Baltic Street AEH (Id. at 4-5). Petitioner had had subsequent contact with the criminal justice system from his release from parole until the encounter with Khalifa (Id. at 4).

The defense memorandum described petitioner's strong family ties, noting that he was a "thoughtful and considerate individual who has a propensity to care about others who suffer from mental and physical heath problems"(Id. at 5). His family "remain supportive of him and will continue [to] encourage him despite his circumstances" (Id.).

The people sumitted their own sentencing memorandum which primarily relied upon petitioner's criminal history and the instant offense conduct- such as petitioner's "pursu[it]" of the fleeing Khalifa- to argue in favor of the maximum sentence (see Peolpe's Mem. at 1-2).

At sentencing, defense counsel reiterated many of the points from the defense memorandum, and emphasized the petitioner had been out on bail through trial and had complied with the requirements of his release (S.2-6). Counsel pointed out that during his earlier incarceration, petitioner bettered himself extensively to prepare to reenter society, completing his GED and many certificate programs while in prison and maintaining employment- focusingon persons with mental illness and contacts with the criminal justice system- once released (S. 2-4). Counsel also

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[4]The program "tains individuals with a lived experience in the mental health system for dirct service, supervisor, and management roles within Human Services".
http:/www.communityaccess.org/our-work/educationajobreadiness/howie-the-harp.

emphasized the unusual circumstances of the encounter, notingthat petitioner continued to assert that he was justified in defending himself from the absent Khalifa, and asked the court to impose the lowest possible sentence (S.4-5).

Speaking on his own behalf, petitioner said:

> I have been a productive citizen. I am a taxpaying citizen .... [Prosecution] lying. He has not come into this courtroom and told one bit of truth, and I have been telling the truth. (S.8)

In response, the people stated that petitioner was a "danger to society" and not rehabilitated (S. 6-7).

Without comment, the court sentenced petitioner as a second felony offener to the statutory maximum sentence of 7 years in prison and 5 years of post-release supervision (S. 8; H. 9).

GROUND : 1

The Court Erred in Failing to Instruct Juros an Acquittql on the Top Count based Upon a finding of Justification Precluded further deliberation an its instructions improperly suggested that Jurors were required to continue deliberation and empowered to render a guilty verdict even if their acquittal on the top count resulted from a determination that petitioner had been Justified, trial counsel were ineffective for failing to make timely objections.

Standard of Review- Trial Court's Improper Jury Instructions And Trial Counsel's Inefective Assistance During Critical Stages of the Proceeding:

Fedral habeas court typically does not review state- law questions determined by state court's including the propriety of jury instructions. Estelle v. McGuire, 502 U.S. 62, 67-69 (1991). Accordingly "[w]here an error in jury instruction is alleged, it must be established not merely that the instruction is undesirable, erroneous, or even 'universally condemed' but that it violated some right which was guaranteed to the defendant by the Fourteeth amendment". Davis v.Strack, 270 F. 3d 111, 123 (2d cir. 2001) (quoting Cupp v. Naughten, 414 U.S. 141, 146 (1973)). " An improper jury instruction can constitute a federal constitutional violation when the 'ailing' instruction by itself so infected the entire trial that the resulting conviction violates due process". Davis, id. at 123; Cupp, id. at 147". Therefore, [the] questionis not whether the trial court gave a faulty instruction, but rather 'whether the ailing instruction' by itself so infected the entire

trial the resulting conviction viplates due process".

In Davis, the Second Circit Court of Appeals set out a three-step analysis for determining whether a state court's refusal to give a specific [] and, or proper jury instruction violates federal due process. Under this analysis, a federal court can grant habeas relief only if it can answer the following three questions affirmatively. First was the jury instruction required as a matter of New York State Law? Second, did the failure to give the required charge [correctly] violate due process accord ing to the standard set out in Cupp? Third, was the state court's failure of such a nature that it is remediable by habeas corpus given the limitations prescribed by 28 U.S.C.§ 2254?

Procedural Default:

A petitioner's federal claims may be procedurally barred from habeas corpus review if they were decided at the state level on **"independent and adequate"** state procedural grounds. Coleman v. Thompson, 501 U.S. 722, 729-33 (1991). the procedural rule at issue is Adequate if it is "firmly established and reguarly followed by the state in question". Garcia v. Lewis, 188 F. 3d 71, 77 (2d cir. 1999)(internal quotation marks omitted)("To be independent basis for its disposition of the case"). Harris v. Reed, 489 U.S. 255, 261-62(1989)(by "clearly and expressly stat[ing] that its judment rests on a state procedural bar". id. at 263(internal quotation marks omitted). If it determine that a claim on the merits unless the petitioner can demonstrate both cause for the default and prejudice resulting therefrom, orif he can demonstrate inextraordinary cases, such as where a constitutional violation results in the conviction of an individual who is actually innocent. Murray v. Carrier, 477 U.S. 478, 496 (1986).

In actuality petitioner hereto is ACTUALLY INNOCENT of the charge of conviction, do to the trial court's IMPROPER charge to the jury. Along with the verdict sheet, which set the stage resulting in the REPUGNANT verdict.

Standard of Review- Ineffective Assistance of trial Counsel:

The Supreme Court has announced a two- part test to determine if counsel's assistance was ineffective. Strickland v. Washington, 466 U.S. 668, 687 (1984).

"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the six amendment". id. this performance is to be judged by an objective standard of reasonableness. 466 U.S. at 688.

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction ... a fair assessment of attorney performance requires that every effort be made to eli minate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluatethe conduct from counsel's perspective at the time ... [a] court must indugle a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy". id. at 466 U.S. 689; see Torres v. Irvin, 33 F. Supp. 2d 257, 277 (SDNY 1998).

Second, the defendant must show prejudice from counsel's performance. Stirckland, 466 U.S. at 687, "question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt" id. 466 U.S. at 695. Put, anothe was, the "defendant must show that there is a reasonable probability that, but for counsel's un professional errors, the result of the proceeding would have been different". id. 466 U.S. at 694.

Petitioner's claim here is that there is no logic for trial counsel to stand mute when the trial court charged the jury incor rectly, under the circumstances of the crime charged, as well as the improper verdict sheet provided to the jury for deliberation. This was totally prejudicial to defendant because it underminds his cause.

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence befor the judge or jury. Some of the factual findings willhave been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. taking the due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent

the errors. id.., 466 U.S. at 695-96.

The Supreme Court has counseled that these priciples "do not establish mechanical rules". id at 696. The focus of the inquiry should be on the fundamental fairness of the trial and whether, despite the strong presumption of reliability, the result is unreliable because of a breakdown of the adversarial process. id. The Supreme Court also made clear that "there is no reason for a court deciding an ineffective assistance claim ...to address both components of the inquiry if the defendant makes an insufficient showing on one ... if it is easier to dispose of an ineffective claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed" id. at 697, accord e.g., Torres, 33 F. Supp. 2d at 277.

Meeting Standar of Review:

A first look at trial court error is paramount to this particular claim, upon this petition which raises serious questions about trial counsel's assistance as a whole.

The court's instructions, considered as a whole and in conjuction with the verdict sheet, failed to adequately convey to jurors that an acquittal on the top count based upon a finding of justification precluded further deliberations and required a not guilty verdict as to all counts. Because there is no way to know whether the verdict convicting petitioner of second-degree assault occurred after a justification based acquittal on attempted first-degree assault charge. The Appellate Court should have vacated petitioner's conviction and granted him a new trial and it is

for this reason, the state court's denial of relief were "contrary to and involved an unreasonable application" of, clearly established federal law, as determined by the Supreme Court of the United States, among other things. U.S. Const., amends. VI, XIV.

Justification as the defense petitioner presented at trial. Such a meritorious defense under the facts and circumstances of the crime charged, rendered the use of force "entirely lawful" a not guilty verdict permised on justification requires acquittal on any count for which the same theory of justification is an element. Thus, and as set forth in the CJI pattern instruction, a court is suppose to inform the jury that a finding of justification on an initial count requires acquittal not only on "that count" but also on "the remaining count(s) to which that same definition of justification applies". CJI § 35.15(1)

With the in mind the state court should have reached this issue in the interest of justice juridiction, and the failure to do so is clearly "base on an unreasonable determination of facts in light of the evidence presented in the trial court proceedings".

To this point in **People v. Tucker,** 55 NY 2d 1(1981): the New York Court of Appeals stated New York's rule regarding repugnant jury verdicts, "When there is a claim that repugnant jury verdict have been rendered in response to a multiple- count indictment, a verdict as to a particular count shall be set aside only when it is inherently inconsistent when viewed in light of elements of each crime as charged to the jury ...

The critical concern is that an individual not be convicted for

a crime on which the jury has actually found that the defendant did not commit an essential element, whether it be one element or all, allowing such a verdict to stand is not merely inconsistent with justice, but is repugnant to it ...

The instructions to the jury will be examined only to determina whether the jury, as instructed, must have reached an inherently self-contradictory verdict. id. at 4, 6, 7 NYS at 132, 133-34,135 ; Accord, e.g., People v. Trappier 87 NY 2d 55, 58 (1995)("A verdict is inconsistent or repugnant ... where the defendant is convicted of an offense containing an essential element that the jury has found the defendant did not commit. In order to determin whether the jury reached 'an inherently self- contradictory verdict a court must examine the essential elements of each count as charged".

The theory here is that the conviction on count 2 was repugnant to-i.e., contradicted- the acquittal on count 1. In this light petitoner's conviction is akin to a verdict base on a violation of double jeopardy.

Here, the trial court altered the crucial CJI language, telling the jury that "if you find that the people have failed to prove beyond a reasonable doubt that [petitioner] was not justified, then you must find him not guilty under count one and two" (387, 341). This failed to convey to the jury that the same theory of justification applied evenly to both counts, and if the jury found that the people had failed to meet their burden on count 1, they should stop deliberating and render a verdict of acquittal on count 2.

In fact, this omission alone constituted reversible error. See Fabri v. United Technologies intern, inc., 387 F. 3d 109 (2d Cir. 2004): " When jury instruction of verdict sheet may lead to incon sistent verdict[] party must object before jury begin its deliberation, and if timely objection is not made, failure can be excused only if district court committed fundamental error, a stand ard more stringent than plain error standard applicable to criminal appeals. Fed. Rule 52 (b), 18 U.S.C.A.,. See, Cash v. County of Erie, 654 F. 3d 324 (2d Cir. 2011);(formulation of special verdict questions rests in trial judge's sound discretion and will warrent reversal only if question mislead or confuse jury, or inaccurately frame issue to be resolved).

Here, the remaining instructions exacerbated this error. Al though the court described justification as an element of each count it failed to inform the jury that a finding of justificat-ion should end the matter. To the contrary, immediately after describing count 1 the court told the jury: "The second count you will consider is assault in the second degree" (390 [emphasis add ed]). By including lack of justification as an element of each crime, therefore, the court implied that these continued deliber ations required reconsideration of the justification defense. See Welch v. United Parcel Service, inc., 871 F. Supp. 2d 164 (EDNY - 2012) holding(A motion for a new trial should be granted when, in the opinion of the district court, the jury has reached a serious ly erroneous result or the verdict is a miscarriage of justice.

Fed Rules Civ. Proc. Rule 59 (A)(1)(A), 28 U.S.C.A.). Justification as element "may have led the jurors to conclude that deliberation on each crime required reconsideration of the justification defense" even with acquittal on top count. See, Reiter v. Maxi- aids, inc., 2018 WL 557864864 (EDNY 2018)[] ("Jury verdict should be set-side only where there is such a complete absence of evidence supporting the verdict that the jury 's findings could only have been the results of sheer surmise and conjecture, or ... such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded man could not arrive at a verdict against him"). Kosmynka v. Polaris indus.,inc ., 462 F. 3d 74, 79 (2d Cir. 2006).

the verdict form, which did not mention justification atall failed to clarify for the jury that reassessment of justification for each count was prohibited. Significantly, the CJI- Approved Model Verdict Sheet for Justification cases contains printed instruction telling jurors that an acquittal due to justification comples both a cessation of deliberations and a not guilty verdict on lesser counts.See **CJI 2d MODEL VERDICT SHEET-JUSTIFICTION**

A jury verdict is supported by sufficient evidence, the court must determine whether there is any valid line of reasoning amd permissible inference which could lead a rational personer to the conclusion reached by the jury on the basis of the evidence at trial and as a matter of law satisfied the proof and burdenrequirements for every element of the crime charged. If that is satisfied, then the verdict will be upheld by the intermediate appellate courton that review basis.

In the present situation, under the circumstances for which the verdict were rendered, violated petitioner's fifth amendment right against "double jeopardy" because as justification was an element of both counts. Acquittal on top count required acuittal on remaining counts, where elements of crime charged were the same. "Federal double jeopardy rule, which states that jeopardy attaches after jury is sworn and empaneled"[].

In Cash, 654 F. 3d 324 (2d Cir. 2011), there was a special verdict sheet issue as well. See Stephenson v. Doe, 332 F.3d 68 (2d Cir. 2003)(A reviewing court usually does not consider an issue not passed upon below, however, the court of Appeals recognizes an exception to this rule, and may grant judgment as a matter of law was made, if necessary to prevent manifest injustice.

The state court refuse to reach the issue in the interest of justice, despite the compelling evidence supporting petit=ioner's justification defense and the impossibility of determining whether the trial court's error led the jury to reach an improper verdict.

This court should grant habeas corpus relief for among

other reasons, a new trial is warranted for defense counsel's failure to object to the improper charge and verdict sheet in a timely manner. Strickland, 466 U.S. at 687-88.

Trial counsel acknowledge her error only untimely, after discharge of the jury (H. 3,4,5,6). This error during the most critical stage of the proceeding, not only deprived petitioner of effective assistance of counsel, but a fair trial, See, U.S v. Cronic, 466 U.S. 648 (1984).

Ineffective assistance of counsel when trial lawyer while moving to dismiss for legal insufficiency, failed to specify an argument that would have prevailed on appeal. Cooper v. Fitz- harris, 586 F.2d 1325 (1978)(the sixth amendment requires that persons accused of crime be afforded reasonable competent and effective representation, where claim of ineffective assistance is founded upon specific acts and omissions of defense counsel at trial, accused must establish that counsel's errors prejudiced defense and representation afforded prisoner satisfied the sixth amendment). Mitchell v. U.S., 259 F. 2d 787 (1958)([] "effective assistance of counsel does not mean successful assistance, and does not relate to the quality of the decisions he makes in the normal course of a criminal case, except that, if his conduct is so incompetent as to deprive defendant of a trial in any real sense, defendant must have another trial, or rather more accurately is still entitled to a trial, and defendant cannot bring about a judicial hearing on and determination of trial competence of defense counsel by making allegations which, either on their

face or after initial testing for verity fail to indicate a lack of skill so great that defendant in realistic fact had not a fair trial".

The state court should have reached the issue in the interest of justice given the compelling evidence supporting petitioner's claims of trial court's error, failing to instruct the jurors properly concerning the elements of the crime charged, and trial counsel's failure to object in a timely manner which was extremely prejudicial. This default attributing to petitioner being denied a fair trial .

The state court's denial of these claims on Appeal were, "contrary to, and involved an unreasonable application" of clearly established federal law as determined by the Supreme Court of the United States, also resulted in a decision that was based on an unreasonable determination of facts, in light of the evidence presented in the state court proceedings, makes clear as well the decision was an abuse of discretion.

Standard of Review -New York's contemporaneous Objection Rule, CPL § 470.05:

The state court's decision denying relief upon Appeal of conviction, fall's outside the scope of the "Adequate and Indepen dent state ground doctrine", under the circumstances for which it was involked.

Meeting Standar5d of Review-

The state court misapplied, New York's "Contemporaneous" ob jection rule, in rejecting petitioner's claims on direct appeal. See Garcia v. Lewis, 188 F. 3d at 77-79; Hathorn, 457 U.S. at 263

Issue:

Trial Court erred in its duty to adequately instruct the jury with respect to the elements of the crime charged to be considered during deliberation.

Trial Counsel's failure to timely object to the errors which occurred during this most critial stage of the proceeding, rendered her assistance incompeteently ineffective, both errors amounting to a denial of a fair trial 5th, 6th, 14th amendment rights guaranteed by the U.S. Constitution.

The State Court Ruling in pertinent part:

"THE DEFENDANT CHALLENGE TO THE COURT"S INSTRUCTION WAS NOT PRESERVED FOR OUR REVIEW, AND WE DECLINE TO REACH THE ISSUE IN THE EXERCISE OF OUR INTEREST OF JUSTICE JURISDICTION(cf. CPL 470.05[6][a];

' IN FULFILLING OUR RESPONSIBILITY TO CONDUCT AN INDEPEN = DENT REVIEW OF THE WEIGHT OF EVIDENCE(CPL470.15[5], WE NEVERTHELESS ACCORD GREAT DEFERENCE TO THE JURY's OPPORTUNITY TO VIEW WITNESSES, HEAR TESTIMONY, AND OBSERVE DEMEANOR. UPON REVIEWING THE RECORD HERE, WE ARE SATISFIED THAT THE JURY'S VERDICT REJECTING DEFENDANT'S JUSTIFICATION DEFENSE AND FINDING HIM GUILTY WAS NOT AGAINST THE WEIGHT OF EVIDENCE';

[]' THE DEFENDANT FAILED TO MAKE A Prima Facie SHOWING THAT THE PROSECUTION EXERCISED IT'S PEREMPTOR CHALLENGES IN A DISCRIM_INATORY MANNER:

' THE DEFENDANT'S REMAINING CONTENTIONS ARE WITHOUT MERIT'"

State Courts Are Not Required To Use Particular language:

State Courts are Not required to Use Particular Language:

In larrea v. Bennett, 2002 WL 1173564, this court noted;

"We encourage state courts to express plainly, in every decision potentially subject to federal review, the ground upon which their judgment rest, but we will not impose on state courts

the responsibility for using particular language in every case in which a state prisoner presents a federal claim- every state appeal, every deial of state collateral review- in order that federal courts might not be bothered with reviewing state law and the record in the case. Coleman v. Thompson, 501 U.S. at 739. Furthermore, unlike the situation where the state court holds that claims were either unpreserved or without merit, whic the Second Circuit has found to be too ambiguous to preclude habeas review, See e.g., Tankleff v. Senkowski, 135 F. 3d 235, 247 (2d Cir. 1998); Reid v. Senkowski, 961 F. 2d 235, 247 (2d Cir. 1998).

Here, the distinguishing factor between Larrea, and the petition before the court today is, in Larrea the court "explicitly" stated that it found his claim to be unpreserved, and the fact that the first Department also stated the conclusion it would reach "w]ere we to review" the claim does not change the result. see, e.g., Fama v. Commissioner of Correctional Service , 235 F. 3d 804, 810-11 & n. 4 (2d Cir. 2000).

"Where a State Court says that a claim is not preserved fo Appall ate review and then ruled 'in any event' on the merits, such a claim is not preserved'", See, e.g., Garcia v. Lewis, 188 F 3d at 77-82 ("There is no question that the Appllate Division's explicit invocation of procedural bar constitutes an 'independant' state ground". [].

Was The State Court's Procedural ground "Adequate" In The Present Case?

Under New York Law, in order to preserve for Appellate review petitioner's claim the the jury charge was erroneous, trial counsel was required to object to charge at trial. See, CPL § 470.05(2); People v. Autry, 75 N.Y. 2d 836, 839 (1990); People v. Jackson, 76 N.Y. 2d 908, 909 (1990); People v. Cadoretter, 56 N.Y. 2d 1007, 1009(1982); people v. Mallory, 258 A.D. 2d 343 (1st Dept.) appeal. denied (1999); People v. Charleston, 56 N.Y. 2d 886, 887-88 (1982), See, also, e.g., Lugo v. Kuhlmann, 68 F. Supp 2d 347, 372-73 (SDNY 1999). (Patterson, DJ & Peck, MJ); Liner v. Keane, 95 Civ. 2738, 1996 WL 33990al *7 (SDNY 1996)(Wood, DJ & Peck, MJ).

The question, however, is not whether New York "generall" applies the **Contemporaneous** objection rule, but whether the rule was applied **"Evenhandedly"** to all claims similar to petitioner here claims ? See, e.g., Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982) holding:

"our decisions, however, stress that a state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed .... state courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly to similar claims".

Petitioner, here contends that this exactly what took place on his direct appeal, because as his appeal was pending before the state court several cases were revesed on this very issue See, e.g., People v. Breckenridge, 162 A.D. 3d 425(1st Dept. 2018

People v. Marcucci, 158 A.D. 3d 434 (1st Dept. 2018); Velez, 132-134.

It was argued on petitioner's direct appeal relying on the ruling in Velez:

"In so doing, the First Department has noted the confusion created when, as here, a trial court not only fails to give a stop-deliberation charge, but also indicates that jurors should consider lesser counts in the alternative or irrespective of the disposition of others. Id. at 131 A.D. 3d 132-134". Also People v. Castro, 131 A.D. 2d 771, 773 (2d Dept.1987; People v. Feuer,11 A.D. 3d 633, 634-35 (2d Dept. 2004). This makes clear that the Appellate Division in this case use of the state procedural ground was **MISAPPLIED.**

In garcia v. Lewis, 188 F.3d 79 States:

(Although " New York's Contemporaneous objection rule is not rendered 'inadequate' on account of novelty or sporadic application ... [petitioner] does not object to New York's contemporaneous objection rule generally, but rather contends that the rile was misapplied in his case particularly".

Garcia is the leading Second Circit case on this issue, worthy of quoting at length.

Standard for Determining The Adequacy of State Ground of Decision

The Supreme Court repeatedly has held that " The question of when and how defaults in compliance with state procedural rules can preclude ... consideration of a federal question is itself a federal question".

"State Courts may not iavoid deciding a federal issue by invoking procedural rules that do not apply evenhandedly to similar claims". Accordingly, a procedural bar will be deemed

"Adequate" only if it is based on a rule that is "firmly established and regularly followed" by the state in question. When a federal court- finds that the rule is inadequate under this test the rule should not operate to bar federal review. Nontheless,the principle of comity that drive the doctrine counsel that a federal court that deems a state procedural rule inadequate should not reach that conclusion "lightly or without clear support in state law".

The responsibility to ensure that the state rule is "Adequate" obligates this court to examine the basis for and application of state law. In making that determination, however, some degree of deference is required. The Supreme Court has suggested that in determining the adequacy of a state procedural bar that precludes consideration of a federal claim, this court's inquire whether there was a "fair or substantial basis" in state law for the default. To this end, when "there can be no pretence that the [state] court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this court accepts the decision whether right or wrong". In line withcases, this court deferred to findings of procedural default as long as they are supported by a "fair or substantial basis" in law.

Was There A "fair or Substantial Basis" In State Law For The Procedural Bar ?

here, the Appellate Division applied New York's codified **Contemporaneous Objection Rule**, which preserves for review only

those questions of law as to which "a protest ... was registered, by the party claiming error, at any subsequent time when the court had opportunity of effectively changing the same". N.Y. CPL § 470.05.

In the present situation trial counsel ultimately sought to remedy her error, during the trial court proceeding. Initially counsel moved for a court order of trial dismissel on the basis of "inconsistantverdict" among a number of other issues. However, prior to counsel's complete objection the court interjected in correction. Stating: "counsel you mean motion setting aside the verdict under CPL 330.30?" Where upon, the court outright denied the motion in all respects. (H. 3,4,5,6).

The New York court of Appeals has explained that this rule "require[s], at the very least, that any matter which a party wishes the Appellate Court to decide have been brought to the attention of the trial court at a time and in a way that gave the latter the opportunity to remedy the problem and thereby avert reversible error". As another New York court has explained "a question of law will be considered preserved for Appellate review when it is interjected at the fact-finding level in such a manner and at such a time as to fairly apprise the court and the opposing party of the nature and scope of the matter contested".

The Supreme Court has recognized that Contemporaneous objection rule of this kind serve a legitimate state interest.

This court too have recognized the propriety of such rules,

noting that "[i]f a state appellate court refuses to review the merits of a criminal defendant's claim of constitutional error be cause of his failure to comply with .... a 'contemporaneous objec tion' rule, a federal court generally may not consider the merits of the constitutional claim on habeas corpus review". As a result this court have observed and deferred to New York's consistent application of its contemporaneous objection rule. Accordingly, New York's contemporaneous objection rule is not rendered "inade-quate" on account of novelty or sporadic application, as sometime is the case. The evidence presented on this petitiondemonstrates this is not the case at hand.

In the Garcia, case he does not object to New York's contemporan-eous objection rule generally, but rather contends that the rule was Misapplied in his case in particular. Contending this demon-strates that New York does not apply its rule "evenhandedly to all similar claims" with in the meaning of Hathron, 457 U.S. at 263, Garcia, 188 F. 3d at 77-79 (citation omitted).

The contemporaneous objection rule also is intertwined with the Appellate Division's discretionary power. New York Law pro-vides the Appellate Division with the discretionary power to rule on forfeited claim "in the interest of justice". CPL §§ 470.15(3) (c), 470.15 (6)(a), in four other reported decisions, the Appell-ate Division was asked to review an unpreserved objection to an Allen charge similar to the offending charge given in Garcia. And in all four cases the Appellate Division reversed the convictions in the "interest of justice"

People v. travis oo, 237 A.D. 2d 646, 647-48 (3d Dept. 1997); People v. Arce, 215 A.D. 2d 277, 278 (1st Dept. 1997); Appeal denied 91 N.Y. 2d 835 (1997); People v. Jones, 216 A.D. 2d 324, 325 (2d Dept. 1995); People v. Allan, 192 A.D. 2d 433(2d Dpet. 1993).

Accordingly, petitioner in the present case ascertive claim here, as was on direct appeal, trial counsel's failure to object to trial court's erroneous justification charge. Did not constitute an "Adequate" state ground for denying relief, because the Appellate Division failed to apply the contemporaneous objection rule "evenhandedly to all similar claims". See, e.g., Wedre v. Lefevre, 988 F. 2d 334, 339-40 (2d Cir. 1993)("we are not convinced that simply because New York Law allows some disrection to be exercised in granting of extentions that a dismissal on the basis of untimeliness does not constitute an adequate procedural bar. Adequacy only requires application of the rule evenhandedly to all 'similar claims'. Procedural bar found to be adequate because cases in which New York courts had granted a discretionary exception were factually distinguishable"). McLaurin v. Kelly, No 94-CV- 1560, 1998 WL 146282 at *6 (NDNY mar. 27, 1998)(Pooler,DJ (the Appellate Division's "application of the contemporaneous objection rule was thus **Atypical** because New York often allows claims like petitioner's to be raised for the first time on appeal ... consequently, its finding of procedural default does not bar federal habeas review of petitioner's claim") Gagne v. Coughlin, 995 F. Supp. 268, 275-77 (EDNY 1996)(Analyzing whether discretionary New York procedural bar was applied consistently enough to satisfy adequacy standard), Aff'd. 129 F. 3d 254(2d Cir 1997).

Wherefore, this court should reach the issue here in theinterest of justice given the compelling evidence supporting petitioner's contentions that, the state court's decision denying relief upon appealof conviction, fell outside the standard of the "Adequate' and 'independent' state ground doctrune", of New York's Contemporaneous Objection rule. See Stephenson, id.

Alternatively, a new trial is warranted due to defense counsel's failure to object in a timely manner, to the improper jury charge and verdict sheet issue. Strickland, 466 U.S. at 687-88.

GROUND: 2

The People Failed to Disprove Justification Beyond a Reasonable Doubt, and the Verdict was therefore against the Weight of the crediable Evidence.

Standard of Review- Weight of Evidence Element- Based Review Legal Sufficiency challenge:

Under AEDPA petitioner has the burden to demonstrate that the state court's decision rejecting his claim is "contrary to, and a unreasonable application" of clearly established federal law, as determine by the Supreme Court of the United States, or that it was based on unreasonable determination of facts in light of the evidence presented in the state court proceeding.

AEDPA also, place new constraint on power of federal habeas court, to grant state prisoners application for Writ of habeas Corpus, with respect to claims adjudicated on merits in state court, limiting issuance of writ to circumstances in which one of the two conditions is satisfied, 28 U.S.C. § 2254.

A federal habeas corpus court must consider not whether there was any evidence to support a state court conviction, but whether there was sufficient evidence to justify a rational trier of facts to find guilt beyond a reasonable doubt. See, In re Winship, 397 U.S. 358, Id. at 2786- 2792 (1970).

(a) As an essential of due process guaranteed by the Fifth and Fourteenth Amendments that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof- defined as **"Every Element"** of the offense. Id. at 2786-2788.

(b) The critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. The rele - vant question is whether after viewing the evidence in most favorable light to the prosecution, any rational trier of facts could have found the essential elements of the crime beyond a reasonable doubt.

The Thompson "no evidence" rule is simply inadequate to protect against **Misapplication** of Constitutional standard of rea- sonable doubt. See, Thompson v. City of Louisville, 362 U.S.199 (1960). Id. at 2788-2790.

(c) in challenge to a state conviction brought under 28 **U.S.C. § 2254,** which requires a federal court to entertain a state prisoner's claim that he is being held in "custody" in vio- lation of the "constitution, or law or Treaties of the United States", the applicant is entitled to habeas corpus relief if it is found that upon the evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt. Id. at 2790-2792. Where state provided for an appeal to state supreme court and on that appeal considers question raised under federal constitution, proceeding in state supreme court must conform to procedural due process. Cole v. State of Ark.,333 U.S. 196.

Meeting Standard of Review:

To being with the state court abused its discretionary power on appeal of revie to make specific finding to deny relief The decision rejecting the claims on direct appeal were "contrary to, and a unreasonable", application of clearly established federal law, as determined by the Supreme Court of the United States and it was based on unreasonable determination of facts in light of the evidence presented at trial.

Petitioner, a peer counselor in Brooklyn, was in the middle of his usual lunchtime walk around the block when he was assaulted without provocation by Khalifa a violent and disturbed man under the influence of cocaine. In broad daylight, Khalifa followed petitioner threatening to "kick [his] ass" and calling petitioner a "nigger" and "slave". Survellance footage captured the complainant picking up something from a construction site just moments before petitioner winded and concern that Khalifa was about to attack him with a brick wrapped in a shirt, confronted khalifa in self-defense. Once petitioner thought Khalifa no longer posed a threat, he escaped with khalifa in continued pursuit and screaming "I am still alive" resumed to pursue petitioner for another 6-7 blocks.

the people's video evidence showed, among other things Khalifa following petitioner and appearing to hold something weighted in his hands. The medical evidence conveyed Khalifa's cocaine intoxication and combative irrational, and racially charged behavior. Together, this evidence overwhelmingly supported petitioner's testimony and, by extention, his justification defense.

Significantly, the people failed to produce their undeniably disturbed and unhinged complainant for trial. Instead, the people seized minor inconsistences to argue that petitioner's actions against the aggressive Khalifa were unreasonable. But the people fell far short of their burden, and many of their argument were legally irrelevant under the justification instruction actually given to the jury. Thus, the people failed to disprove justification beyond a reasonable doubt, and the verdict was therefor against the weight of the credible evidence. Jackson v. Virginia, 433 U.S. 307, 315 (1979). U.S. Const., Amends. V, XIV.

A justification defense becomes an extra element that the poeple must disprove beyond a reasonable doubt P.L. §§ 25.00(1), 35.00; Matter of Y.K., 87 N.Y. 2d 430, 433 (1996). Physical force against another is justified when a person "reasonably believes such to be necessary to defend himself" against "the use or imminent use of unlawful phsical force by other person". P.L. § 35.15 (1).

Petitioner, testified that while walking khalifa unprovocked, elbowed him in the collarbone as they were passing on the street, called petitioner a "nigger" and "slave", and Threatened to "kick [his] ass" - and be came more agitated as petitioner tried toretreat,(162-63). this encounter established that khalifa was the initial aggressor, capable of violence and spoiling for a fight. Right from the first, khalifa both physicslly attacked petitioner and threaten him, while using charged racial slurs.

Not only did the people not dispute the initial encounter, their evidence supported petitioner's testimony. khalifa's medical records, introduced by the people, showed he was high on cocaine during the entire encounter and, at the hospital, behaved in such an alarmingly irrational and abusive manner that he could not be treated without sedation. He also called the EMT team "nigger bitches" (287; Peo. EX. 1[Medical Records]). In other words, khalifa was precisely who petitioner said he was.

Continuing, petitioner testified that he attempted to retreat and lose Khalifa, but that he persisted in following him [petitioner] across the street and around the corner, even cutting into busy traffic to get away (163-64, 172-75, 204). This testimony was amply corroborated by people's Exhibit 2, the survellance footage, which shows Khalifa follow [petitioner] despite ample opportunities to go the other direction (Peo.'s Ex. 2 at 1:07:23-30).

Petitioner testified that the encounter escalated when, winded he turned around and realized khalifa had picked up something from the nearby construction site, had wrapped it in some cloth - ing, and was menacing him with it (164-65, 183). And again, the people's evidence corroborates petitioner's testimony. The surveillance footage shows Khalifa bending over and picking something up before wrapping it in the clothing he was carrying; it then "pendulums" back and forth as he continues to approach petitioner (people's Ex. 2 at 10:07:33-40). The other visual evidence, such as the cell-phone video and still image, both show Khalifa holding clothing that sags in his grip(people's Ex. 7 [cell-phone - video] at .00-10; people's Ex. 8 [cell-phone still image]).

Here, the people did challenge petitioner's story by eliciing statements that Khalifa did not have a weapon, but the eyewitness testimony relied upon simply cannot be squared with the visual evidence to the contrary. Both Toribio and Reyes testified that Khalifa held nothing in his hands Toribio:(8, 16, 25, 30 ; Reyes:(117-18, 120-21), which is flatly contradicted by the cell phone and surveillance- camera evidence. Guy, who was closer, testified more accurately, remembering that Khalifa was holding something but "not sure what it was"(49). the people's witnesses were simply wrong, and the visual evidence is consistent with petitioner's explanation that Khalifa wrapped a brick or debris in an article of clothing that he held.[5]

Petitioner testified that, in the scuffle that followed, he jabbed Khalifa a few times with a wire stripper, aiming low trying to disarm him and ran away once he thought Khalifa could no longer harm him (165-67, 182-85,190, 195-96, 219). The cell-phone video and still image supported petitioner's testimony, and the audio visual evidence as a whole showed that the entier scuffle lasted less than 20 seconds. Moreover, nothing in Guy's or Toribio's recounting disputed petitioner's testimony or the clear timeline established by the videos. While both witnesses thought that petitioner used a "knife", they were far enough away so that the difference between tool might not have been clear, and wit-

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5 Even assuming there was no brick, petitioner had already been physically attacked, threatened, and pursued by the cocaine-fueled Khalifa. Thus, petitioner's belief that some kind of physical assault was imminent, and his use of physical force in self-defense, would still have been reasonable.

ness Toribio in particlar testified to the chaotic and confusing struggle between the two men.

While the people extensively relied on Reyes' suggestion that petitioner"chased" khalifa during the scuffle, none of the other witnesses recounted anything similar. Indeed, the 911 caller said that Khalifa chased petitioner(people's Ex. 11). Moreover Reyes was facing away from the scene, admitted she was not paying close attention, was wrong about several other details encounter- such as her insistence that petitioner was wearing a suit- and frequently editorialized duringher time on the stand (112-14, 118, 120, 122). In short, to the extent that the fleeting mention of a "chase" was even legally significant, it was not credibly supported by the broader record.

Finall, petitioner testified that Khalifa contiued to pursue him as petitioner zigzagged to avoid leading the deranged man back to his office (167-68, 180, 189-90, 207, 253). Yet, again, the people's evidence supported petitioner. Officer Louard testiied that both men were found near each other, about 6 or 7 blocks away from the scene(61-72, 101-06; people's Ex. 12 [Map]). Far from trying to dodge police, petitioner testified that he hoped to encounter them on route back- which included Atlantic Avenue - who would notice that Khalifa kept chasing him and render aid(175). And all of the people's eyewitnesses agreed Khalifa took off in the same general direction as petitioner, although they varied on the specifics.

Bearing in mind that it was the people's burden to disprove petitioner's justification defense beyond a reasonable doubt, the people managed instead only minor ambiguity about irrelevant particulars. Here, Khalifa, whom the people failed to produce for trial was a violent and deranged man petitioner described, and was also under the influence of cocaine. From the moment he encountered petitioner, Khalifa was both physically aggressive and actively threatening- more than enough to render him the aggressor under the law, especially given that petitioner was in poor health(174).

The people could not seriously dispute that Khalifa was filmed picking something up from the construction site, or that he had created a threatening hostile, and intimidating environment even before picking up the brick.

Further, to the extent that petitioner "chased" khalifa and the evidence overwhelmingly shows he did not- a brief pursuit does not defeat justification.

The relevant inquiry in the state court should have been, not whether Khalifa was retreating but whether petitioner reasonably believed that he posed an imminent threat. The people did not convincingly argue that in the heat of the moment, and in light of Khalifa's post-encounter conduct, such a belief would been unreasonable.

Given the extensive evidence showing the reasonableness of petitioner's response in the face of a dangerous and disturbed man, the people advanced a variety of legally dubious arguments that likely confused the jury's analysis of justification.

For one, the people repeatedly suggested that petitioner had some responsibility to "feel" or take advantage of other more peaceable options (216-223). This is simply not so. A "physical force" justification defense has no requirement of a duty to retreat. Only deadly force justification requires retreat but that charge was neither requested nor given.See P.L. § 35.15(1)-(2) ; CJI 35.15(2). The people are bound to disprove the charge actually given, petitioner's failure to "choose" continueous retreat cannot defeat his defense.

For another, and relatedly, the people suggested petitioner's use of force was excessive. Given the facts presented at trial, the winded and otherwise poor health petitioner would have been justified in using deadly force when confronted with a clearly deranged individual menacing him with a brick. But again, only physical- force justification was charged here.

In the face of so much evidence that petitioner was justified in his actions, the jury's guilty verdict could therefore be explained by the prosecutor's misleading suggestions that petitioner had a duty to retreat or to otherwise prove that the use of the wire stripper was proportionate to the perceived threat. This is especially so tandem with the prosecutor's repeated suggestions, amounting misconduct, that petitioner had a duty to preserve Khalifa's weapon and that petitioner was generally a dangerous and vengeful man. See (Grounds 1, 3).

the state court's denial was incorrect as unreasonable for not finding that petitioner's rights were violated, do to the verdict being against the weight of the evidence.

which totally affected the outcome of the trial. This violation hinged on Pre-Se prejudice, Vivar v. Senkowski, 335 F. Supp 2d 344 (EDNY 2004) (Petition granted in part, denied in part) "[] arguing that his conviction for criminal possession of a weapon in the second degree. Violated due process of law as guaranteed by 14th amend., because the state failed to prove every element of the offense". Jackson v. Virginia, 433 U.S. 307 (1979) "presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused". U.S.C.A. Const. Ament. 14th., Bruton v. U.S., 391 U.S. 123 (1968) "a defenant is entitled to a fair trial but not a perfect one, there are some context in which risk that jury will not, or cannot follow instructions is so great and consequences of failure so vital to defendant in criminal cause that parctical and human limitations of jury system cannot be ignored"; Deutch v. U.S., 367 U.S. 456 (1961) "Prosecution has burden of establishing guilt solely on basis of evidence produced in court and under circumstances assuring an accused all safe-guards of a fair procedure, including presumption of his innocence".

In James v. Moore, 2008 WL 5188145 (Dec. 10, 2008), Place emphsasis on the phrases "contrary to" and "unreasonable application" hav[ing] independent meanings; a federal habeas court may issue the writ under the contrary to clause if the state court applies a rule different from the law set forth in ... [Supreme Court] cases, or if it decides a case differently than we have done on a set of materially indistinuishable facts. The court may grant relief under the " Unreasonable application" clause if the

state court correctly- identifies the governing legal priciple from .... [Supreme Court's] decisions but unreasonably applies it to the facts of a particular case. The focus on the latter inquiry is whether the state court's application of clearly established federal law is objectively unreasonable ... and a unreasonable application is different from an incorrect one.
See, langston v. Smith, 630 F. 3d 318 (2d Cir. 2011) " reasonable jury would not have convicted petitioner of felony assault and federal habeas relief was warranted".

In conclusion here for the reasons stated above, this court should grant habeas relief, and conclude that petitioner's indictment is dimissed and order his immediate release from state custody.

GROUND: 3

The Prosecutor Committed Misconduct During Cross-Examination and Summation, by Vouching for his Witnesses While calling Petitioner a liar shifting the burden of Proof, making inflammatory Comments, Testifying and Misstating record evidence and Impling that Petitioner was a Dangerous and Vengeful person- all while also misstateing the Applicable Law.

Standard of Review- Prosecutorial Misconduct:

In determining whether a petitioner is entitled to a writ of habeas corpus, a federal court must apply the standard of review provided in 28 U.S.C. § 2254, as amended by AEDPA, which provides in relevant part:

> "If the federal claim was not adjudicated on the merits 'AEDPA' deference is not required, and conlusion of law are reviewed 'de novo'". Dolphy v. Mantello 552 F. 3d 236, 238 (2d Cir. 2009)(quoting Spears v. Greiner, 459 F. 3d 200, 203(2d Cir. 2006).

Foot Note: Ground(s) 4 and 5 are addressed under the same standard of review as noted above.

Meeting Standard of Review:

Through a combative cross-examination and heated summation, the prosecutor did more than just argue that petitioner's justification defense was not worthy of belief. The prosecutor shifted the burden of proof to petitioner, pressed him to testify that certain prosecution witnesses were lying, acted as an unsworn witness, vouched for the prosecution's witnesses while denigrating petitioner, and in summation- described petitioner as having a violent and vengeful character.

Thought, the prosecutor's comments also gave the jury an erroneous view of the relevant law, which was not cured by the jury charge. This misconduct denied petitioner a fair trial and deprived him of dur process. See U.S. Cont., Amands. V, XIV; Darden v. Wainwright, 477 U.S. 168, 181 (1986); Moore v. Morton, 255 F. 3d 95, 119-20 (3d Cir. 2001).

Moor, ruling that "habeas relief was appropriate when prosecutor made improper race-based comments and trial judge's curative instructions to the jury were not adequate to ensure a fair trial"' and listing in footnotes 15 and 16 cases where habeas relief was granted or denied for improper [] comments.

First, the prosecutor repeatedly shifted the burden of proof to petitioner by suggesting, among other things, that petitioner had the responsibility to preserve evidence, to remain at the scene, or to otherwise explain why he had not "warned" Khalifa or made a more peaceable choice. For instance, the prosecutor suggested that it was petitioner's burden to produce witnesses to corroborate his story about the brick, by asking him why he was "the only person that has come in court" to testify about it(Tr. 226, 252, 255, 264-65, 341), and that petitioner had the duty to call 911 or to otherwise warn Khalifa about the wire stripper(Tr. 216-17, 350). "Given the choice of calling 911 ... he didn't do so"' the prosecutor said, and "[t]hat's why [petitioner] is in this chair" (Tr. 334). The prosecutor also suggested that it was petitioner's responsibility to "wait on the scene" for police to arrive and "have this man arrested"(Tr.248),

and to justify why petitioner emerged from the fracas uninjured (Tr. 236). These comments served to shift the burden to petitioner to provide affirmative proof of justification and lack of intent, and also impermissibly referred to his pre-arrest slience See, Robinson v. Graham, 671 F. Supp. 2d 338 (NDNY 2009) "[i]t is not enough that the prosecutor's remarks were undesirable or even universally condemned. The relevant question is whether the prosecutor's comments'so infect [] the trial with unfairness as to make the resulting conviction a denial of due process'"; Darden v Wainwright, 699 F.2d at 1036.

Second, the prosecutor vouched for the people's witnesses while calling petitioner a liar. Donnelly v. Dechristoforo, 416 U.S. 637 (1974) " Moreover, the apporpriate standard of review for such a claim on writ of habeas corpus is 'the narrow one of due process, and not the broad exercise of supervisory power".Id. at 642; United States v. Young, 470 U.S. 1, 11 (1985) "remarks of the prosecutor in summation do not amount to a denial of due process UNLESS they constitute 'egregious misconduct'". Referring to witnesses Guy and Reyes and Toribio the prosecutor said all had testified under oath and remarked, "I submit that they told you exactly what they saw. They have no basis here... no motive to lie" (Tr. 335, 338). The prosecutor's improper vouching shifting the burden to petitioner, suggesting it was his obligation to present the jury with a reason to disbelieve the various witnesses. Petitioner's testimony, by contrast, was "nonsense" because "[he] will say anything to you"; should not be believed because "[n]one of that happened" and the only personsaying to the contrary is "the interested [petitioner]", and "everything" he said was

"an embellishment" or "a straight up lie" (Tr. 341, 356-57). See, Garofolo v. Coomb, 804 F. 2d 201, 206 (2d Cir. 1986). These exhortations were plainly improper.

Relatedly, the prosecutor also engaged in misconduct, both innately and through additional burden shifting, by pressing petitioner to say that Officer Louard "lied" about the arrest(Tr.257-58). The prosecutor then repeated this characterization on summation, asking the jury, "what's officer Louard's motive to lie ...?" (Tr.353). But it is "improper for a prosecutor to force a defendant on cross-examination to characterize the prosecution witnesses as liars". Miranda v. Bennett, 322 F. 3d 171,180 (2d Cir.2003) Id. at 180.

In deciding whether a defendant has suffered prejudice of due process proportions as a result of prosecutorial misconduct, court have considered (1) the severity of the misconduct; (2)the measure adopted to cure the misconduct; (3) and the certainty of conviction absent the improper statements. See, Floyd v. Meachum, 907 F. 2d 201, 206 (2d Cir. 1990).

the prosecutor also testified to the jury. Without record support, the prosecutor told the jury that petitioner "came up with the idea" to throw away the wire stripper "because people are following me" (Tr. 356). The prosecutor assured the jury that during the scffle, Khalifa was "fleeing" from petitioner, "[m]ake no mistake about it" (Tr. 339), and that the instrument seen in the cell-phone still picture was "a knife". "Clear as day" (355). With regard to the path petitioner took following the incident, the prosecutor was inappropriately acting as an UNSWORN witness.

People v. Paperno, 54 N.Y. 2d 294, 300-01(1981) "Unsworn witness rule generally stands for proposition that prosecutor may not interject his own credibility into the trial, rule is violated when prosecutor, by cross-examination suggests existence of facts not in evidence". See, e.g., Mitchell v. Artus, No. 07 Civ. 4688 LTS AJP, 2008 WL 2262606 at * 22 (SDNY June 2, 2008). "Like other claims of prosecutorial misconduct, a violation of the 'unsworn witness' rule results in a constitutional error 'only when the prosecutorial remarks were so prejudicial that they rendered the trial in question Fundamentally Unfair'". See, Garofolo v. Coomb, 804 F. 2d 201, 206 (2d Cir. 1986).

Perhaps most troubling was the prosecutor's repeated suggestion that petitioner was generally a violent, dangerous, and vengeful man. The prosecutor told the jury that petitioner "[a]ll six foot one 300 pounds of him" was "not used to this" kind of disrespect(Tr. 338). And was instead an "angry" (Tr. 215, 345)person inflicting pain on "tiny" Khalifa (Tr.342)- to "teach" him a "lesson", because petitioner was the kind of person who "solve[d] [his] problems" with his "knife" Tr. 343, 346, 359). In closing pitch to the jury, the prosecutor returned to this theme: petitioner did not back down because "that's not what this defendant does", and he "chased" Khalifa to "finish the job" (Tr. 359). The prosecutor's improper comments served to "convey to the jury, by insinuation, suggestion or speculation,the impression that the petitioner is guilty of other crimes not in issue at the trial" or was otherwise of bad character. Gonzalez v. Sullivan, 934 F 2d 419, 424 (2d Cir. 1991); United States v. Young, 470 U.S. 1, 11 (1985)

"Remarks of the prosecution in summation do not amount to a denial of due process umless they constitute ' egregious misconduct'". United States v. Shareef, 190 F. 3d 71, 78 (2d Cir. 1999) also see, Lisenba v. California, 314 U.S. 219, 236 (19410; Bentley v. Scully, 41 F 3d 818, 824 (2d Cir. 1994) "Suffered actual prejudice because the prosecutor's comments during [cross-examination and, or] summation had a substantial and injurious effect or influence in determining the jury's verdict". United States v. Thomas, 377 F. 3d 232, 245 (2d Cir. 2004).

The Supreme Court has long recognized that "[i]t is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or guilt of the defendant". See, Young, id. at 1, 8 (quoting ABA Standard for Criminal Justice 3-5. 8(b)(2d. ed. 1980); Accord United States v. Nersesian, 824 F. 2d 1294, 1328 (2d Cir. 1987). However, a reviewing court "must evaluate the challenged remarks in the context of the trial as a whole, for the government is allowed to respond to argument that impugns its integrity or the integrity of its case" United States v. Rivera, 22 F. 3d 430, 438 (2d Cir. 1994). In Donnelly, The Supreme Court found that a prosecutor's remark: While unambiguously improper, was merely trial error, and that the "distinction between odinnary trial error of a prosecutor and that sort of egregious misconduct" that "amount[s] to denial of constitutional due process" must be maintained. Id. at 416 U.S. 647-48. Unlike in Gonzal, any impropriety regarding the statements here by the prosecutor in

summation were not sever enough to equate with the "eregious conduct" refered to in Donnelly, and any potential threat to petitioner's constitutional rights was effectively neutralized by the instructions of the trial judge. See, e.g., United States v. Rivera, 971 F. 2d 876, 885 (2d Cir. 1992) (Finding that the trial court's instructions cured any prejudice arising from prosecutorial error). As the Second Circuit has noted "[o]ften, the existence of substantial prejudice turns upon the strength of the government's case: if proof ofguilt is strong, then the prejudice effect of the comments tends to be deem insubstantial, if proof of guilt is weak, then improper statements are more likely to result in reversal". United States v. Modica, 663 F.2d 1173, 1181 (2d Cir. 1981);Also Bentley, at 41 F. 3d 818, 824.

Finally, the prosecutor misstated the law pertaining to petitioner's justification defense by claiming that petitioner had a duty to retreat, and that "punching" would have been acceptable while using an instrument was not (Tr. 223, 334, 346, 360), "a prosecutor's remarks, even if improper and beyond the bounds of fair advocacy, will not warrant habeas relief'unless the remark caused the petitioner substantial prejudice'". Bradley v. Meachum, 918 F. 2d 338,343 (2d Cir. 1990). First, the prosecutor assertion the "we wouldn't be here" if petitioner had punched the complanaint (Tr. 346) is both erroneous, in the sense that it could still at a minimum be charged as third-degree assault, P.L. § 120.00(1), and misleading, in that the prosecutor's arguments against justification would apply equally had petitioner punched

the complainant. Second, petitioner had no duty to retreat under the charged physical-force justification, but the jury would not have been aware that a lack of such duty is one of the key differences between physical-force and deadly-force justification.

Both individually and cumulatively, the prosecutor's improper comments, in tandem with a sarcastic and inflammatory tone , deprived petitioner of due process and a fair trial. See, Umited States v. Young, 470 U.S. 1 (1985); United States v. Robinson , 485 U.S. 25 (1988).

This pervasive misconduct cannot be deemed harmless. Chapman v. California, 386 U.S. 18, 23 (1967). As set forth in here, the prosecution failed to present the complanaint for trial and did not even attempt to challenge petitioner's testimony that he was repeatedly and violently menacing petitioner. And by vouching for witnesses, denigrating petitioner and otherwise straying outside of the boundaries of the factual record, the prosecutor encourage the jury to disbeliev petitioner's otherwise logical and credible recollection of the events and todisregard the many instances where the evidence corroborated his testimony- such as the video and medical evidence showing that Khalifa pursuit of petitioner, or the EMT who confirmed KHalifa's irrational, racist and violent behavior.

Moreover, the prosecutor's incorrect statement of legal principles was particularly damaging where the prosecutor assailed petitioner for failing to take actions that were of no legal consequence to justification. The jury was not told to disregared the legal arguments of counsel, and the instructions given could not"cure" the prosecutor's misstatements because they did not

affirmatively inform the jury that those dispited elements, particularly the duty to retreat and the difference between a punch and stab, were irrelevant. The prosecutor therefore USRPED the court's function of instructing the jury on the law. See, Darden v. Wainwright, 477 U.S. 168 (1986).

Defense Counsel objected to several of the prosecutor's com ments such as attempt to shift the burden to petitioner regarding the production of Khalifa's weapon for trial(Tr. 252) and the similar need to keep the wire stripper (Tr. 255), preserving them for review. To the extent that this court deem, this argument above rest on points not preserved in the trial court, the argument should be reached in the interest of justice. See, e.g., Jhonson v. Bellnier, 2010 WL 7100915 (EDNY November 8, 2010).

Here the state court upon appeal rule this matter to be without "merit, or not preserved", for review. This denial falls well outside the standard of "Adequate and Independent" state ground doctrine. The Supreme Court repeatedly has held:[] State Courts may not avoid deciding a federal issue by invoking procedural rules that do not apply 'Evenhandedly'". [] When a federal court finds that the rule is inadeqate under this test the rule should not operate to bar federal review.

Alternatively, because there is no apparent reason why defense counsel would not object and request curative instructions or a mistrial, this court should find that counsel was constitutionally ineffective for failing to do so. U.S. Const. Amend. VI; Strickland v. Washinton, 466 U.S. 668, 687-88 (1984).

For the above reasons, this court should grant habeas relief vacate petitioner's conviction and remand for a new trial.

GROUND 4

The Prosecutor's Two-Incidents Theory Transformed the Single Count of Assault into Two Separate Counts, Creting impermissible Duplicity and rendering it Impossible to determine Whether the Jury was Unanimous in its Verdict.

Standard of Review- Prosecutor's Misconduct Enterjecting Unsupported/ uncharged Theory of Crime, Creating Impermissible Duplicity:

The federal standard of review upon this ground is the same as the one noted for ground #3.

The prosecutor's theory of the case asked the jury to treat the single assault charge as two separate counts- based on when Khalifa allegedly "fled" - and to reconsider justification for each. In an error similar to the one committed by the court in ground #2, above, this violated the well- established prohibition against **Duplicitious** counts. Because it is therefore impossible to tell if the jury was unanimous in its verdict, petitioner was deprived of his rights to due process and a fair trial. U.S. Const., Amends. V, XIV.

Each count of an indictment "may charge one offense only ". CPL § 200.30(1). The prohibition on duplicitous counts "further not only the function of notice to a defendant and of assurance against DOUBLE JEOPARDY, but also ensures the reliability of the unanimous verdict". A facially vaild count can become duplicitous if the "evidence presented at trial makes plain that multiple criminal acts occurred during the time period, rendering it nearly impossible to determine the particular act upon which the jury reached its verdict".

Under New York Law "[e]ach count of an indictment may charge one offense only". N.Y. Crim. Proc. Law § 200.30(1). See, Schwatz v. Connel, No. 05 Civ. 10305 (RPP) 2006 WL 3549660, at *8 (SDNY Dec. 6, 2006) Gray v. Artuz, 931 F. Supp. 1048, 1051(SD-NY 1996), " a count of an indictment is duplicitous under NY Law if it charges more than one offense".

Here, the indictment charged a single count of assault, and a single charge of attempted assault based on different intended outcome, arising out of Khalifa's confrontation with petitioner-doing so was appropriate, because a single assualt charge ordinarily covers an uninterrupted course of conduct, not each separate attack. United States v. Aracri, 968 F. 2d 1512,1518 (2d Cir 1992).

The prosecutor seized on Reyes stray comment about a "chase" to split the single incident in two, and ask the jury to reconsider the use of force for each even though no charge to that effect was requested or given. The prosecutor's argument was that the initial encounter, in which petitioner stabbed Khalifa , was interrupted by his flight, and petitioner's decision to "finish the job" marked a second, dicrete incident of assualt for which the jury needed to reassess justification- even if the jury believed petitioner was justified as to the first part of the encounter (Trial Record 358-59).

the prohibition against duplicitous indictments serve the following policy considerations interms of clarity:

Avoiding the uncertainty of whether a general verdict of guilty conceals a finding of guilty as to one crime and a finding of not guilty as to another, avoiding the risk that the jurors

may not have been unanimous as to any one of the crimes charged , assuring the defendant adequate notice, providing the basis for appropriate sentencing, and protecting against double jeopardy in a subsequent prosecution.

The prosecutor's theory created a duplicitous assualt count allowing the jury to treat the single confrontation as two separate incidents. It is thus impossible to tell whether the jurys verdict was unanimous. Some of the jury could have thought petitioner was not justified at all, while the rest of the jury could have thought petitioner was justified as to the "initial" encounter but not the subsequent confrontation after Khalifa's alleged flight. "constitutional provisions respectively relating to tenure and compensation of judges and providing for presentment or indictment of grand jury drawn from the people and the provisions for trial by jury, are safeguards designed to protect defendants against oppressive government practices". U.S. v. Gallo, 394 F. Supp. 310 (D. Conn. 1975), one purpose of a require ment that an individual be indicted by grand jury is to place between the prosecutor and accused an indpendent body, which can evaluate the evidence and determine if the charge is based upon reason.

Although the court did partly charge that justification equaled a not- guilty verdict, but see ground #2 above, the court never told the jury to disregard the prosecutor's erroneous statement of the law, which the jury could easily have reconciled with the court's instruction: "if you find petitioner justified for both purported uses of force, he is not guilty. And unlike

cases like People v. Kaid, where the prosecution's theory simply offered the jury alternative means (not requiring unanimity), the theory here asked the jury to decide on what were now two different justification elements. See, Kaid, 43 A.D. 3d at 1082-83 (no duplicity when theory split means rather than elements).

Evidentiary Claims:

For habeas petitioner to prevail on a claim that an evidentiary error amounted to a deprivation of due process, he must show that the error was so prevasive as to have denied him a fundamentally fair trial. United States v. Agurs, 427 U.S. 97 (1976) Id. at 108. The standard is "whether the erroneously admitted evidence, viewed objectively in light of entire record before the jury was sufficiently material to provide the basis for conviction or to remove a reasonable doubt that would have existed on the record without it. It must have been 'crucial, cruitical, hightly significant'". Collins v. Scully, 755 F. 2d 16, 19 (2d Cir. 1985)(quoting Netties v. Wainwright, 677 F. 2d 410, 414 -15 (5th Cir. 1982). This test applies post- AEDPA. See, Wade v. Mantello, 333 F. 3d 51, 59 (2d Cir. 2003); Velilla v. Senkwoski, 20-CV- 6458 2003 WL 23198791 at *9 (EDNY Oct. 30, 2003). U.S. v. Acquest Development, LLc, 932 F. Supp. 2d 453 (WDNY 2013)(very purpose of fifth amendment requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge).

In sum, the count of conviction was rendered **Duplicitous** by the prosecutor's split trial theory. This court should vacat petitioner's conviction by way of habeas relief, in the interest of justice authority and remand for a new trial. Alternatively, a new trial is warranted by counsel's failure to object to the duplicitous charge. Strickland, 466 U.S. at 687-88.

GROUND : 5

The Court Erred When it Excluded as "Collateral" Petitioner's Wife's Testimony That He Carried a Wire Stripper and not a Knife, When it would have Corroborated a Key Element of His Testimony and Rehabilitated His Credibility, both of which directly related to His Justification Defense.

Standard of Review- The Court Erred When it Excluded as "collateral" Petitioner's Wife's Testimony:

The federal Standard of review upon this ground is the same as the one noted for ground(s) #3 and #4.

Meeting Standard of Review:

Both in their case-in-chief and during petitioner's cross - examination, the people advanced the theory that petitioner had stabbed Khalifa with a knife, a weapon, rather than with a wire stripper, a tool. In short, the people argued that petitioner was lying when he denied using a knife as part of the defense case counsel sought to rehabilitate petitioner and corroborate his testimony by calling his wife, Nicole McGriff, to speak about petitioner's repair hobby and his habit of carrying around a wire stripper, but the trial court erroneously bared her testimony as collateral. This incorrect exclusion deprived petitioner of his Constitutional right to present a defense, to due process, and to a fair trial. U.S. Const., Amends. VI, XIV; See, Cran v. Kentucky, 476 U.S. 683, 690 (1986); Also see C.P.L § 60.15(1).

As defense counsel set forth, Nicole's testimony was being offered to corroborate petitioner's story and if necessary, to rehabilitate his credibility. The people case in chife had included extensive testimony about the alleged "knife" (Toribio : Tr. 14-15; Guy: 43; Reyes: 114-15, 117) and people's Exhibit 8 showed petitioner with a sharp instrument in his hand. When petitioner testified that it was actually a wire stripper (Tr. 165 , 167) the prosecutor attempted to undermine this testimony on cross-examination, aggressively and sometimes sarcastically questioning petitioner's truthfulness(Tr. 219-20, 223, 255), and stating that the jury would "have to rely on" petitioner's testimony because of lack of corroborating evidence (Tr. 220). The knife was one of the key points on which the prosecution attempted to impeach petitioner's credibility. In fact, in summation , the prosecutor not only emphasized the identity of the "knife" in stead of "wire stripper" (Tr. 355).

Nicole's testimony would have provided the corroboration alluded to as lacking by the prosecution. Her testimony about her husband's habit of carrying a wire stripper for the purpose of repair hobby wpuld have been directly relevant to both the intent and justification elements of the charged offense, also, while there is nothing inherently illegal about carrying a knife, commone sense suggests that a jury would perceive the disput differently if petitioner were deploying a hobbyist's tool in a frantic attempt to defend himself.

Furthermore, the jury's assessment of petitioner's truthfulness is central to the justification defense, and petitioner testified that he used a wire stripper, not a knife- a fact clearly not "collateral" in the people's view, especially as the people argued on summation that it undermined his credibility. Because petitioner's credibility was central question in assessing his justification defense, it simply could not be collateral. See, Jamison v. Auburn Correctional Facility, 2015 WL 8770079 (EDNY 2015). (the trial court excluded petitioner's wife's testimony regarding their sexual relationship on the ground that it was irrelevant. The Appellate Division did not specifically discuss petitioner's claim that the exclusion of character evidence was improper). This determination is entitled to AEDPA deference. Watson, 640 F. 3d at 508 n.7; Jimenez, 458 F. 3d at 146.See, also Wade v. mantello, 333 F. 3d 51, 57 (2d Cir. 2003). In this vein "where constitutional rights directly affecting the ascertainment of guilt are implicated the hearsay rule may not be applied mechanistically to defeat the ends of justice". Chambers, 410 U.S. at 302 (1973); Hawkins v. Costello, 460 F. 3d 238 (2d Cir. 2006). Only errors of federal constittuional law are cognizable on habeas review. Crispino v. Allard, 378 F. Supp. 2d 393, 408-(SDNY 2005) (" [i]t is well established that the mere fact that a state court made evidentiary errors, without more,does not provide a basis for habeas relief")(Citing Estelle, 502 U.S. at 72)

The court's failure to allow Nicole to testify clearly harmed the defense. Chapman, 386 U.S. at 23.

It allowed the prosecutor to suggest, both directly and implicitly, that petitioner was engaged in an unsupported fabrication- that he would "say anything" to the jury to appear sympathetic, and that the failure to produce the tool at trial amounted to deception (Tr. 356). Moreover, despite arguing that Nicole's testimony was "collateral" during the colloquy with the court, the prosecution eagerly returned to attacking petitioner's credibility regarding the tool in closing: " If it was really this wire stripper, right, that he wants you to believe, wouldn't he have kept it ?" (Tr. 355). With credibility and corroboration directly bearing on the elements of justification and intent, the exclusion of this witness cannot be harmless.

The question here is [w]hether the ailing instruction of the state court to exclude Nicole's testimony by itself, so infected the entire trial that the resulting conviction violates due procss ? Cupp v. Naughten, 414 U.S. 141, 147 (1973); also see Henderson v. Kibbe, 431 U.S. 145, 154 (1977); Donnelly v. Dechistoforo, 416 U.S. 637, 643 (1974). In Cupp,it was held: "an improper jury instruction can constitute a federal constitutional violation when the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process".Id at 123 (2d Cir. 2001).

This issue was preserved when defense counsel proposed calling Nicole and in response the people's demand, explained the scope of her testimony regarding petitioner's hobbies and the need to correct the prosecutor's implication that petitioner was lying and had used a knife (Tr. 277-78).

In Deluca v. Lord, 858 F. Supp. 1330 (SDNY 1994) " Respondents contend that petitioner anbandoned her request to present the proposed expert testimony because she did not request a ruling from justice Tonetti at trial. Therefore, they argue, she is procedurally barred from raising this claim in her habeas petition". the magistrate judge rejected this argument, finding that justice Tonetti had put an end to this issue in his ruling at the § 440 hearing. Although admitting that his decision may have been off the record, justice Tonetti stated that " my recollection is that ... the court made a ruling denying counsel's application to call that witness and that it was preserved for the record". This court accepted magistrate judge Robert's recommendation that the respondents assertion of proceduraldefault be rejected. [] even if erroneous, evidentiary ruling by state court " do not automatically rise to the level of constitutional error sufficient to warrant issuance of a writ of habeas corpus". Taylor v. Curry, 708 F. 2d 886, 891 (2d Cir. 1983). A defendant is entitled to habeas relief only when she/ [h]e can show that the error was so prejudicial as to amount to a denial of due process or that it was tantamount to the denial of a fundamentally fair trial". Id at 891 (emphasis in original; citations omitted). "It is the materiality of the excluded evidence to the presentation of the defense that determines whether a defendant has been deprived of a fundamentally fair trial". Rosario v. Kuhlman, 839 F. 2d 918, 925 (2d Cir. 1988) (Citing Taylor v. Curry). Erroneously excluded evidence is material and constitut - ional error has been committed " if the omitted evidence creates

a reasonable doubt that did not otherwise exist". Rosario, 839 F. 2d at 925 (quoting United States v. Agurs, 427 U.S. 97, 112-13 (1976).

Legal Standard:

Noble v. Kelly, 89 F. Supp. 2d 443 (SDNY 2000). The Sixth amendment to federal constitution guatanteed every criminal defendant "the right ... to have compulsory process for obtaining witnesses in his favor ..." U.S. Const., Amend. VI. Although some have suggested that the compulsory process clause only guarantees the power to subpoena witnesses, See, Taylor v. Illinois, 484 U.S 400, 407-08, nn. 10-12 (1988). The Supreme Court of the United States has consistently held that, such a right would be meaningless unless it were also interpreted as a right to present those witnesses at trial. See, Michigan v. lucas, 500 U.S. 145, 149(1991); taylor, 484 U.S. at 407-08 ("Our cases establish at a minimum, that criminal defendants have ... the right to put before a jury evidence that might influence the determination of guilt") (Citing Pennsylvania v. Ritchie, 480 U.S. 39, 56 (1987). The right to present exculpatory testimony is central to concept of an adversary system. Taylor, 484 U.S. at 408-09 (Citing United States v. Nixon, 418 U.S. 683, 709 (1974)), and is "a fundamental element of due process of law", id. at 409 (Citing Washington v. Texas, 388 U.S. 14, 19 (1967)). See also Chambers v. Mississippi, 410 U.S. 284, 302 (1973)(" few rights are more fundamental than that of an accused to present witnesses in his own defense"). Of course, the accused's right to present witnesses in his defense is not without limits. For example a court may limit the present

ation of evidence if it is concerned about "harassment,prejudice, confusion of the iusse, the witness' safety, or interrogation that is repetitive or marginally relevant". Delaware v. Van-Arsdall, 475 U.S. 673, 674 (1986). Similarly, it is consistent with compulsory process clause for the state to enact discovery or evidentiary rules that limit a defendant's opportunities to prevent favorable testimony. Lucas, 500 U.S. at 149, 151(rape shied statute); Rock v. Arkansas, 483 U.S. 44, 55-56 (1987) (Citing Chambers, 410 U.S. at 295). Alibi - notice staties, such as the one at issue here, have been reviewed by the court on two occasions and found to be constitutional each time. See Wardius v Oregon, 412 U.S. 470, 474 (1973) (describing a similar statute as "a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system").

If the court deems any aspect of the issue unpreserved, it is respectfully requested that the court reach it in the interest of justice or, alternatively, rule that trial counsel was ineffective for failing to appropriately object. Strickland, 466 U.S. at 687-88. For the reasons set forth above, this court should grant habeas corpus relief, vacate petitioner's conviction on the law and remand for a new trial.

GROUND : 6

The Court's Step-One denial of Defense Counsel's Batson Application, which alleged that the Prosecution disproportionately Struck Black Jurors with no apparant basis for most of the challenges- thus meeting the defense's burden of Showing Prima Facie discrimination- was Error.

Standard of Review- Court's Error Denying Defense Counsel's Batson Application:

As AEDPA provides in pertinant part:

In habeas proceedings " a determination of factual issues made by state court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of corect ness by clear and convincing evidence". 28 U.S.C. § 2254(e)(1). Also, AEDPA placed new constraint on power of federal habeas court to grant state prisoners application for writ of habeas corpus with respect to claims adjudicated on merits in state court, limiting issuance of writ to circumstances in which one of the two conditions is satisfied.

Meetin Standard of Review:

The prosecution used 9 of 11 peremptory challenges to strike black panelists. When the defense challenged this extremely high and apparently arbitrray deployment of strikes, the prosecutor's only response was that the seated jury was purportedly not "majority" white. On this record, the defense's challenge more than made out a Prima Facie case of racially based peremp-

tory challenges, and the trial court's summary decision to contrary was error. U.S. Const. Amend., XIV; Batson v. Kentucky, 476 U.S. 79, 98 (1986).

The use of peremptory challenges to purposefully exclude persons of a particular race violate the federal constitution.

The three- step Batson assesses whether the prosecution has exercised peremptory challenges on the basis of race: 1) a prima facie showing of race- based strikes, 2) opposing party's articulation of race- neutral rationale, and 3) determination of whether the proffered reason was pretextual. Id. at 571 (Citing Batson, 476 U.S. at 96- 98.

This case implicates the first of batson's three steps: A prima facie case. the prima facie burden is not onerous as " a defendant satisfies the requirments of Batson's first step by producing evidence sufficient to permit the trial judge to draw inference that discrimination has occurred". Johnson v. California, 545 U.S. 162, 170 (2005). Relevant factors include numerical arguments , whether seated panelists shared similar charateristics or answers with the excluded panelists, and whether the defendant shares a group identity with the excluded jurors. Batson, 476 U.S. at 96- 97.

Here, defense counsel's challenge combined numerical information with qualitative assessments of those struck. Defense coun sel argued that 9 Of 11 peremptories used by the prosecution served to eliminate black prospective jurors (J. 285). A Batson chal lenge brought via habeas petition must defeat the "presumption of correctness" afforded to the trial court's first- hand observation of the events in voir dire. Galarza v. Keane, 252 F. 3d 630 635 (2d Cir. 2001) "[i]t is one thing to conclude that a pattern

of strikes is prima facie evidence of unreasonable application of Batson", See Sorto v. Herbert, 497 F. 3d 163, 174 (2d Cir. 2007).

Counsel did not rely on a numbers argument alone, turning to the fact that the prosecutor struck at least 4 of the panelist for no apparent reason, as those panelist had said "virtually not hing " (J. 283). Defense counsel contrasted this to panelist Solstad, who had discussed her status as a crime victim (J. 283).

Outside of Solstad, the challenged black panelists from the first two rounds- Barrow, Dunn, Philip, and Stewart- gave minor biographical details and answered innocuous questions about "consistency", but were otherwise silent (J. 72- 73, 88- 99, 108, 112 The third- round challenges meanwhile, included panelists like Grant who had answered only biographical questions, and those like Best who answered questions in a manner favorable to the prosecution (J. 213- 15, 259- 60). Far from providing grist for the prosecution, those removed were largely the people who said nothing at all. And yet the prosecution agreed to seat, among others, a person who had worked for a public defender and experienced unpleasant street harassment- neither of whom was black (J. 79, 86, 94- 95, 106, 111, 121).

Ignoring defense counsel's qualitative arguments, the prosecutor responded to the numeracy argument by pointing to black jurors whom he had allowed to be seated. However, "[t]he mere inclusion of some members of defendant's ethnic group will not defeat an otherwise meritorious [Batson] motion". Because the

habeas petitioner bears the burden of demonstriating a violation of constitutional rights if a deficiency in the record make it impossible to ascertain the existence of discriminatory conduct, the petitioner's claims must be rejected. Id at 172- 73. The number of strikes in this case provided an ample statistical base line, distingushing this fact pattern from cases where the number of strikes were too small to be statistically significant.

The Second Circuit also has observed that while the burden of showing a prima facie case is not onerous, it safeguards "the traditional confidentiality of lawyer's reason for peremptory strikes unless good reason is adduced to invade it ..." id.at 170 (Citing Miller- El v. Dretke, 545 U.S. 231 (2005). Because the law forbids "the exclusion of even a single juror on racial grounds". Rosario v. Ercole, 582 F. Supp. 2d 541 (SDNY 20=08), "state trial court unreasonably applied federallaw in ruling that Rosario failed to establish a prima facie case under batson claim". It thus matters little that the prosecution did not strike all of the black members of panel. Moreover, as petitioner is a black man removing black people from the jury directly affected the "cognizable group" of which he is a part.

In short, the disproportionate number of challenges to black panelist combined with the lack of obvious on-the-record reasons for challenging them, more than met petitioner's step-one burden. The trial court's summary ruling that there was no "pat-tern" was thus incorrect and without any clear grounding in the record.

The Second Circuit often has noted the perils of using a snapshot in tome amid an incomplete voir dire when reviewing a Batson objection raised in a habeas petition to ascertain the existence of a prima facie case, "[t]he discharge of this burden may entail a review of prosecutorial strikes over the span of selection process". Sorto, 497 F. 3d at 170. this is because in part, "[t]he need to examine statistical disparties may commend a wait-and-see approach", and because "an early Batson challenge--- limits that state court's ability to properly assess a prima facie case". Id.

Petitioner's Batson claim was preserved via a timely challenge and the trial court's ruling. This Batson argument presented by defense counsel at jury selection. But to the extent this court deems any aspect of the issue unpreserved and necessary for disposition favorable to petitioner, it is respectfully requested that this court reach it in the interest of justice or, rule that trial counsel was ineffective as grounds for granting habeas relief. Strickland, 466 U.S. at 687-88.